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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 18

M. J. PUFAHL, AS RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, PETITIONER,

vs.

ESTATE OF ELVIRA J. PARKS, DECEASED

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED MARCH 27, 1936.

CERTIORARI GRANTED APRIL 27, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No.

M. J. PUFAHL, AS RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, PETITIONER,

vs.

ESTATE OF ELVIRA J. PARKS, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS

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[fol. 1] [Caption omitted]

[fol. 2]

IN PROBATE COURT OF COOK COUNTY

Estate of ELVIRA J. PARKS

to

M. J. PUFAHL, Receiver of the Austin National Bank of Chicago

ASSESSMENT AGAINST EXECUTORS

On Account of assessment against twelve (12) shares of stock held by the estate of Elvira J. Parks.

Assessment	$1200.00
Interest to 8-11-33	127.17
	$1327.17 with interest

to date of allowance of the claim.

[fol. 3] IN PROBATE COURT OF COOK COUNTY

NOTICE OF ASSESSMENT

Office of Receiver, The Austin National Bank of Chicago, Ill.

Chicago, Ill., May 21, 1931.

You will please take notice, That the Comptroller of the Currency has on May 21, 1931, levied an assessment upon the stockholders of the Austin National Bank of Chicago, Ill. of the par value of each and every share, payable at the office of the Receiver on or before June 29, 1931. The Receiver is, however, authorized by the Comptroller to grant an extension, without interest to shareholders who pay 25 per cent of the assessment on or before that date, and who will give a written obligation, satisfactorily guaranteed, to pay 25 per cent additional on or before July 29, 1931, 25 per cent additional on or before August 29, 1931, and the remaining 25 per cent on or before September 29, 1931.

You are therefore required to pay the assessment on the — shares of Stock standing in your name in accordance with the foregoing order and this notice. Your prompt compliance will be a great benefit to creditors of this trust and advance materially its early liquidation.

M. J. Pufahl, Receiver The Austin National Bank of Chicago, Ill.

[fol. 4] IN PROBATE COURT OF COOK COUNTY

Comptroller of Currency
Ed. 300. Dec. 1-23.
Form 2428.

ASSESSMENT UPON SHAREHOLDERS

Treasury Department,

Office of the Comptroller of Currency

Washington, May 21, 1931.

No. 10337

In the Matter of THE AUSTIN NATIONAL BANK of Chicago, Ill.

To all whom it may concern:

Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of "The Austin National Bank of Chicago," Chicago, Ill., and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereafter mentioned, as prescribed by Section 5151 and 5234 of the Revised Statutes of the United States, 1 c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment, and requisition upon the shareholders of the said "The Austin National Bank of Chicago," for two hundred fifty thousand ($250,000) dollars to be paid by them on or before the 29th day

of June, 1931, and I hereby make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct M. J. Pufahl, the Receiver heretofore appointed to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have thereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, the twenty-first day of May A. D. 1931.

F. G. Awalt, Acting Comptroller of the Currency.
(Seal.)

[fol. 5] August 7, 1933.

I hereby certify that the attached is a true and correct copy of notice of assessment upon shareholders of the Austin National Bank of Chicago, Illinois, made by F. G. Awalt, Acting Comptroller of the Currency, under date of May 21, 1931 in the sum of Two Hundred Fifty Thousand Dollars.

M. J. Pufahl.

Subscribed and sworn to before me this 7th day of August, 1933. Flornece W. Bergling, Notary Public, Cook County, Illinois. (Seal.)

[fol. 6] In Probate Court of Cook County

Claim Against Estate of Elvira J. Parks

M. J. Pufahl, Receiver of the Austin National Bank of Chicago, being duly sworn deposes and says that the annexed claim against the estate of Elvira J. Parks, deceased, is just and unpaid, after allowing for all just credits, and that the said M. J. Pufahl, Receiver of the Austin National Bank of Chicago, has no other claim against said estate.

M. J. Pufahl.

Subscribed and sworn to before me this 12 day of August, A. D. 1933. Mitchell C. Robin, Clerk of the Probate Court, Notary Public.

[Endorsed:] Pd. 2.25. Doc. 271, page 136. File 134337. Claim No. 2. Estate of Elvira J. Parks. Claim of M. J. Pufahl, Receiver of the Austin National Bank of Chicago. $1,327.17. Filed August 12th, A. D. 1933. Mitchell C. Robin, Clerk. Class No. —. Allowed for $—. Disallowed Jan. 13, A. D. 1934. John F. O'Connell, Judge. Cont'd 11/17/10. Cont'd 12/2/11 A. M. Cont'd 12-18-11 A. M. Cont'd 12/29 at 2 P. M. Cont'd 1-3-2 P. M. Glenn, Schwartz, Real & Browning, 134 South LaSalle St., Dearborn 3700. Appeal prayed and allowed—20 days—Bond, $250.00. P. W. Huston, Ex.

[fol. 7] IN PROBATE COURT OF COOK COUNTY

In the Matter of the Estate of ELVIRA J. PARKS, Deceased

ORDER DISALLOWING CLAIM—Jan. 13, 1934

The claim of M. J. Pufahl, receiver of the Austin National Bank of Chicago, filed against the estate of Elvira J. Parks, deceased having been reached for adjustment and the court being fully advised in the premises, and having heard the testimony adduced it is Ordered that said claim be disallowed against said estate.

From which order M. J. Pufahl, not individually but as Receiver of the Austin National Bank of Chicago prays an appeal to the Circuit Court of Cook County, and the same allowed upon giving bond in the sum of $250.00 to be approved by this Court within 20 days from this date.

[fol. 8] STATE OF ILLINOIS,
County of Cook, ss:

I, Mitchell C. Robin, Clerk of the Probate Court of Cook County, in the State aforesaid, do hereby certify that the within is a true transcript of the proceedings had before said Court in the matter of the estate of Elvira J. Parks, dec'd, entered herein on the 22 day of Jany., A. D. 1934.

In witness whereof, I have hereunto set my hand and affixed the seal of said Probate Court at Chicago, in said County, this 9th day of February, A. D. 1934.

Mitchell C. Robin, Clerk.

[fol. 9] Bond on appeal for $250.00, approved and filed Jan. 22, 1934, omitted in printing.

[fol. 10] IN PROBATE COURT OF COOK COUNTY

Doc. 271, Page 136, File 134337

In the Matter of the Estate of ELVIRA J. PARKS, Deceased

ORDER APPROVING BOND—Jan. 22, 1934

This cause coming on to be heard on motion of Glenn, Schwartz, Real & Browning, attorneys for M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, claimant, for the approval of the appeal bond of said M. J. Pufahl, as receiver, and the Court having examined said bond doth find that it is properly executed by the claimant and a surety company qualified to do business in this Court.

It is, therefore, ordered, adjudged and decreed that said bond be, and the same is hereby approved and filed in this cause.

Enter.

John F. O'Connell, Judge.

Dated January 22, 1934.

Clerk's certificate to foregoing paper omitted in printing.

[fols. 11 & 12] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 13] IN CIRCUIT COURT OF COOK COUNTY

No. 34C 1758

In Re Estate of ELVIRA J. PARKS, Deceased

SPECIAL FINDINGS OF FACT, PROPOSITIONS AT LAW, AND JUDGMENT—Jan. 14, 1935

And now on this 14th day of January A. D. 1935 come the parties hereto by their attorneys, pursuant to a continuance of said cause from the 8th day of January, 1935; and this cause coming on for the entry of special findings of fact and propositions at law and for the entry of judg-

ment; and this cause having been tried on appeal from the Probate Court of Cook County, Illinois, the issues herein joined having been submitted to the Court on stipulation of facts filed herein for trial without the intervention of a jury;

And the Court having read the stipulation of facts filed herein and heard the arguments of counsel and being now fully advised in the premises, finds as special findings of fact:

1. That Elvira J. Parks at the time of her death on March 20, 1928, and for a long time prior thereto, was the owner [fol. 14] and holder of Twelve (12) shares of capital stock of the Austin National Bank of Chicago of the par value of One Hundred Dollars ($100.00) per share;

2. That Philip W. Huston and Frank M. Pray as Executors of the Estate of Elvira J. Parks, deceased, are now the owners and holders of twelve (12) shares of the capital stock of the Austin National Bank of Chicago, of the par value of One Hundred Dollars ($100.00) each.

And the Court further finds as propositions at Law:

1. That by virtue of the provisions of Section 5152 of the Revised Statutes of the United States of America (12 U. S. C. A. Section 66), the said Philip W. Huston and Frank M. Pray, as Executors of the Estate of Elvira J. Parks, deceased, are liable to the extent of the property and funds in their hands as such executors, to M. J. Pufahl, Receiver of the Austin National Bank of Chicago, in the sum of Twelve Hundred Dollars ($1200.00) with interest thereon at the rate of five per centum (5%) per annum from the 29th day of June, 1931;

2. That by virtue of the provisions of Section 70 of the Act of the State of Illinois in regard to the administration of estates, in force July 1, 1872 as amended (Smith-Hurd Illinois revised Statutes, Chap. 3, Sec. 71) the liability of [fol. 15] the said Philip W. Huston and Frank M. Pray, as Executors of the Estate of Elvira J. Parks, deceased, to the said M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, cannot be asserted against assets of the Estate of Elvira J. Parks, deceased, inventoried within one (1) year from the granting of letters testamentary, by a

claim filed against said estate in the Probate Court of Cook County, Illinois.

Therefore, it is considered and adjudged by the court that the claim of M. J. Pufahl, Receiver of the Austin National Bank of Chicago, be and it is hereby allowed against uninventoried assets of the Estate of Elvira J. Parks, deceased and that said claim be and it is hereby disallowed and rejected as a claim against assets of the Estate of Elvira J. Parks, deceased, inventoried within one (1) year from the granting of letters testamentary; and that judgment be entered for the defendants Philip W. Huston and Frank M. Pray, Executors of the Estate of Elvira J. Parks, deceased and against M. J. Pufahl, Receiver of the Austin National Bank of Chicago, claimant, for costs of this suit.

Enter.

Daniel P. Trude, Judge.

Dated January 14, 1935.

[fol. 16] In Circuit Court of Cook County

[Title omitted]

Notice of Appeal—Filed Feb. 1, 1935

To Castle, Williams, Long & McCarthy, 111 W. Washington Street, Chicago, Illinois:

Please take notice, That M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, claimant in the above entitled cause, hereby appeals to the Appellate Court of Illinois, First District, from the judgment rendered and entered in this cause in the Circuit Court of Cook County, Illinois, on the 14th day of January, A. D. 1935, said judgment allowing the claim of said M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, against the uninventoried assets of said estate, and disallowing and rejecting the claim against the assets of said estate generally.

Claimant prays that the judgment of the Circuit Court of Cook County, State of Illinois, be reversed insofar as it denies the allowance of the claim of said M. J. Pufahl,

as Receiver, against the assets of said estate generally, and that said claim be allowed against said estate.

Dated February 1, A. D. 1935.

Glenn, Schwartz, Real & Browning, Attorneys for Claimant.

Received copy of the above and foregoing notice this 1st day of February A. D. 1935.

Castle, Williams, Long & McCarthy.

Compared.

[fol. 17] IN CIRCUIT COURT OF COOK COUNTY

[Title omitted]

NOTICE OF FILING OF NOTICE OF APPEAL AND RECEIPT FOR COPY THEREOF—Filed Feb. 5, 1935

To Castle, Williams, Long & McCarthy, 111 W. Washington Street, Chicago, Attorneys for Philip W. Huston and Frank M. Pray, as Executors of the Estate of Elvira J. Parks, Deceased:

Please take notice, that on the 1st day of February A. D. 1935, we filed in the office of the Clerk of the Circuit Court of Cook County, Illinois, Notice of Appeal in the above entitled cause, and thereby perfected the appeal of M. J. Pufahl, as Receiver of the Austin National Bank, to the Appellate Court of Illinois, First District, from the judgment entered in the above proceedings on the 14th day of January 1935; a true copy of which said notice by which said appeal was perfected was heretofore served upon you on the first day of February A. D. 1935.

Glenn, Schwartz, Real & Browning, Attorneys for Appellant.

Received copy of foregoing notice and notice of appeal therein referred to, this 4th day of February A. D. 1935.

Castle, Williams, Long & McCarthy.

Compared.

[fol. 18] IN CIRCUIT COURT OF COOK COUNTY

[Title omitted]

STIPULATION OF FACTS—Filed Feb. 5, 1935

It is hereby stipulated by and between Philip W. Houston and Frank M. Pray, as Executors of the estate of Elvira J. Parks, deceased by their attorneys, Castle, Williams, Long & McCarthy, and M. J. Pufahl, Receiver of the Austin National Bank of Chicago claimant by Glenn, Schwartz, Real & Browning, his attorneys:

1. That for many years last past the Austin National Bank of Chicago has been a National Banking Association duly organized, incorporated and chartered under the laws of the United States, and having its place of business at Chicago, in Cook County, in the State of Illinois.

[fol. 19] 2. That on the 30th day of March A. D. 1931, the Comptroller of Currency of the United States declared and adjudged said Austin National Bank of Chicago, a National Banking Association, to be insolvent, and thereupon closed said bank and subsequently, on the 6th day of April A. D. 1931, the said M. J. Pufahl was appointed Receiver of said bank by the Comptroller of Currency of the United States of America, and said M. J. Pufahl thereupon qualified as such receiver and since the date of his appointment until the present time has been engaged in the liquidation of the assets of said bank.

3. That on the 21st day of May A. D. 1931, the Comptroller of Currency of the United States, in order to pay the debts of the Austin National Bank of Chicago (successor by change of name to the Austin National Bank) made an assessment upon all the stockholders of said bank equal to 100% of the par value of the stock of said bank owned by each of said stockholders including an assessment against the defendants, Philip W. Houston and Frank M. Pray, as Executors of the last will and testament of Elvira J. Parks, deceased, of 100% of the par value of the stock owned by said Philip W. Houston and Frank M. Pray, as such Executors, in the amount of Twelve Hundred Dollars ($1200.00), said assessment being in the sum of One Hundred Dollars ($100.00) per share on twelve

[fol. 20] (12) shares of the capital stock of said bank, and said Comptroller of Currency of the United States of America did then and there demand of all of said stockholders and of said Philip W. Houston and Frank M. Pray, as Executors, the payment of said stock assessment as aforesaid, together with interest at the rate of 5% per annum from the 29th day of June 1931; and said Executors received notice of all these facts, but have refused to pay M. J. Pufahl, as Receiver, the amount so due or any part thereof.

4. That the Comptroller of Currency of the United States of America on the 21st day of May, 1931, directed M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, to take all necessary proceedings by suit or otherwise to enforce the assessment levied against the capital stock of said bank.

5. That said Elvira J. Parks died on the 20th day of March, 1928, and at the time of her death and for a long time prior thereto she was the holder and owner of twelve (12) shares of capital stock of the Austin National Bank of Chicago of the par value of One Hundred Dollars ($100) per share; that letters of Administration were issued by the Probate Court of Cook County, Illinois, to Philip W. Houston and Frank M. Pray on the 17th day of May, 1928, in a proceeding pending therein entitled, In the matter of the Estate of Elvira J. Parks, deceased, Docket No. 271, [fol. 21] Page 136, File 134337, and that an order of adjudication was entered in said proceeding on, to-wit, the 6th day of March, 1929. And it is further stipulated that an Inventory and Supplemental Inventory were filed in the Probate Court of Cook County within one (1) year after the date of issuance of Letters Testamentary, and that said estate is still open and there has been no final distribution.

6. That on the 1st day of September, 1933, said M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, filed in the Office of the Clerk of the Probate Court of Cook County, Illinois his claim against the Estate of Elvira J. Parks, deceased, in the sum of $1327.17 said sum consisting of $1200 assessment and interest calculated at the rate of 5% to date of filing claim. Said claimant further prayed for interest from date of filing claim to date of allowance.

7. That the Comptroller of the Currency has issued his respective certificates certifying to the insolvency of the Austin National Bank of Chicago, the appointment of M. J. Pufahl, as Receiver of said Bank, and to the levying of an assessment upon all shareholders of said bank equal to the par value of each and every share of capital stock of said bank held by them.

Glenn, Schwartz, Real & Browning, Attorneys for M. J. Pufahl, as Receiver of the Austin National Bank of Chicago. Castle, William, Long & McCarthy, Attorneys for Philip W. Houston and Frank M. Pray, as Executors of the Estate of Elvira J. Parks, Deceased.

[fol. 22] I, the undersigned Judge of the Circuit Court of Cook County, State of Illinois, who presided at the trial of said cause, do hereby certify that the foregoing stipulation of Facts contains all the evidence introduced at the trial of the said cause before this Court.

Daniel P. Trude, Judge.

Feb. 5, 1935.

We hereby certify that we have examined the above and foregoing Stipulation of Facts and find the same to be true and correct.

Castle, William, Long & McCarthy, Attorneys for Estate of Elvira J. Parks, Deceased, Appellee.

[fol. 23] In Circuit Court of Cook County

[Title omitted]

Notice of Appearance—Filed Feb. 6, 1935

To Glenn, Schwartz, Real & Browning, 134 South LaSalle Street, Chicago, Illinois:

Please take notice that the defendant, Estate of Elvira J. Park, deceased, hereby enters its appearance in said cause:

Castle, Williams, Long & McCarthy, Attorneys for the Estate of Elvia J. Park, Deceased, Appellee.

Received a copy of the foregoing notice this 5th day of February, 1935.

Glenn, Schwartz, Real & Browning, Attorneys for M. J. Pufahl, Receiver of the Austin National Bank of Chicago, Appellant.

[fol. 24] Bond on appeal for $250.00, approved and filed Feb. 7, 1935, omitted in printing.

[fol. 25] In Circuit Court of Cook County

[Title omitted]

Order Approving Bond—Feb. 7. 1935

On motion of Glenn, Schwartz, Real & Browning, solicitors for M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, claimant in the above entitled cause.

It is hereby ordered that the appeal bond of said M. J. Pufahl, as Receiver of the Austin National Bank of Chicago be and the same is hereby approved and filed in this cause, this 7th day of February 1935. It is further ordered that said bond operate as a supersedeas and that further distribution of the Estate of Elvira J. Parks, deceased, be stayed.

Daniel P. Trude, Judge.

Chicago, Feb. 7, 1935.

o. k.

[fol. 26] In Circuit Court of Cook County

[Title omitted]

Præcipe for Transcript of Record—Filed Feb. 7, 1935

To Honorable John E. Conroy, Clerk of said Court:

You will please prepare and include in the Transcript of the Record to be sent to the Appellate Court of Illinois, First District, upon the appeal of the claimant, M. J. Pu-

fahl, as Receiver of the Austin National Bank of Chicago, in the above entitled cause, the following:

1. Placita.
2. Stipulation of Facts, together with certificate of the court.
3. Transcript of Record from Probate Court.
4. Judgment Order.
5. Notice of Appeal.
6. Proof of service of notice of appeal.
7. Præcipe with receipt for service.

[fol. 27] 8. Appeal bond.

9. Order approving appeal bond.
10. Appearance of Estate of Elvira J. Parks, deceased.

Glenn, Schwartz, Real & Browning, Attorneys for Claimant, Appellant.

Due Service and receipt of copy of the within Præcipe is hereby admitted this 7th day of February A. D. 1935.

Castle, Williams, Long & McCarthy, Attorneys for Appellees.

[fol. 28] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 29-31] [Caption omitted]

[fol. 32] IN APPELLATE COURT OF ILLINOIS

38123

In Re ESTATE OF ELVIRA J. PARKS, Deceased

M. J. PUFAHL, as Receiver of the Austin National Bank of Chicago, Claimant Below, Appellant,

vs.

ESTATE OF ELVIRA J. PARKS, Deceased, Respondent Below, Appellee

Appeal from Cook Circuit

ORDER EXTENDING TIME—March 11, 1935

This day came appellant by his counsel and moved the Court to extend the time to and including March 30th, A. D.

1935, in which to file his abstracts and briefs in said cause as per reasons and affidavit filed herein. And the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

[fol. 33] IN APPELLATE COURT OF ILLINOIS

ORDER ASSIGNING CASE—March 15, 1935

On the Court's own motion it is ordered that the following numbered cases on the April Term Calendar, A. D. 1935, of said Court be and the same are hereby assigned to the Third Division Appellate Court for hearing and determination, to-wit:

38123: In Re Est. Elvira J. Parks, dec'd., v. Est. Elvira J. Parks, M. J. Pufahl, Receiver etc., et al., dec'd.

[fol. 34] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING MOTION FOR LEAVE TO AMEND BRIEFS—April 10, 1935

This day came Appellant by his counsel and moved the Court for leave to amend his briefs heretofore filed herein in said cause on its face as follows: By striking out the words "in the funds" appearing in paragraph 1, line 4 on page 9, By correcting the word "curency" appearing in the second paragraph, line 6, page 15, to read "currency", By correcting the word "agaist" appearing on line 6, paragraph 2, page 18, to read "against", and by striking out the word "court" appearing at the end of line 7, par*garpah* 1, page 21, as per suggestions and affidavit filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

[fol. 35] IN APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

[Title omitted]

MOTION OF APPELLANT TO TRANSFER CAUSE TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND REASONS IN SUPPORT THEREOF—Filed April 23, 1935

Now comes M. J. Pufahl, Receiver of the Austin National Bank, appellant herein, by Glenn, Schwartz, Real & Browning, his attorneys, and moves this Honorable "The Third Division of the Appellate Court, First District" to transfer the record in the above entitled cause to the Supreme Court of this State and in support of said motion states the following reasons:

1. That one of the errors assigned by the appellant raises a constitutional question.

2. That the Constitution of the United States vested in the Congress of the United States the power to create, regulate and liquidate National Banking Institutions and in accordance with that power Congress provided for liability against the Executors of the estate of a deceased stockholder upon the insolvency of the bank, and that said [fol. 36] liability is created by Sections 64 and 66, Title 12, U. S. C. A.

3. That the lower court allowed the claim of appellant against the Estate of Elvira J. Parks, deceased, but further held that said claim could not share in the inventoried assets of said estate, but could share only in the assets of said estate that had not been inventoried, for the reason that said claim had not been filed against said estate within one year after the issuance of Letters Testamentary therein, the decision of said court being based upon Section 70 of the Administration of Estates Act.

4. That Section 70 of the Administration of Estates Act is in contravention of the Constitution of the United States and the Acts of Congress passed in pursuance thereof, insofar as said Act purports to bar claims arising under Sections 64 and 66, Title 12, U. S. C. A., from sharing in the inventoried assets of an estate against which said claim is filed, when said claim accrues and is filed against said

estate subsequent to one year after the issuance of Letters Testamentary.

5. That the Supreme Court of the State of Illinois has exclusive jurisdiction to decide the constitutionality of Section 70 of the Administration of Estates Act, and that this court does not have jurisdiction to decide said question.

Appellant therefore moves for a transfer of this cause to the Supreme Court of the State of Illinois.

Glenn Schwartz Real & Browning, Attorneys for Appellant.

[fol. 37] STATE OF ILLINOIS,
County of Cook, ss:

Harold E. Baily, being first duly sworn, on oath deposes and states: That he is an attorney at law associated with the firm of Glenn, Schwartz, Real & Browning, attorneys for appellant; that said appellant desires to move this court for an order transferring the above entitled cause to the Supreme Court of this State, for the reason that a constitutional question is raised by the appellant and that this court does not have jurisdiction over the same.

Harold E. Baily.

Subscribed and sworn to before me this 19th day of April, A. D. 1935. (Sgd.) A. D. Tighe, Notary Public. (Seal.)

[fol. 38] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER DENYING MOTION TO TRANSFER CAUSE—April 26, 1935

The Court having considered the motion of Appellant to transfer the above entitled cause to the Supreme Court of Illinois as per reasons and affidavit filed herein. And being now fully advised in the premises doth order that said motion be and the same is hereby denied.

[fol. 39] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER OF SUBMISSION—May 1, 1935.

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on brief filed and appellant's reply brief due May 9, 1935.

[fols. 40 & 41] IN APPELLATE COURT OF ILLINOIS

No. 38123

In the Matter of the Estate of ELVIRA J. PARKS, Deceased

M. J. PUFAHL, Receiver of the Austin National Bank of Chicago, Claimant Below, Appellant,

vs.

Estate of ELVIRA J. PARKS, *Deceased*, Respondent Below, Appellee

Appeal from Circuit Court of Cook County

JUDGMENT—Dec. 27, 1935

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Order and judgment of January 14th, A. D. 1935, aforesaid is there anything erroneous, vicious, or defective; and that in the record there is no error: therefore, it is considered by the Court that the order and judgment of January 14th, A. D. 1935, aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the

Court that the said Appellee recover of and from the said Appellant its costs, by it in this behalf expended, to be taxed, and to be paid in due course of Administration of said Receivership.

[fol. 42] In Appellate Court of Illinois, First District

[Title omitted]

Notice—Filed Jan. 7, 1936

To Castle, Williams & McCarthy, 111 W. Washington St.:

Please take notice, that on Wednesday, the 8th day of January, A. D. 1936, we shall appear at 10 o'clock a. m. before the Third Division, Appellate Court, First District of Illinois, and present the petition of appellant in the above entitled cause praying for a Certificate of Importance and leave to appeal to the Supreme Court of Illinois, and ask that the Court fix the time within which appeal bond, if any, [fol. 43] shall be filed, and the amount of said bond.

Glenn, Schwartz, Real & Browning, Attorneys for Appellant.

Received copy of above and foregoing notice and attached petition this 7th day of January, A. D. 1936.

Castle, Williams & McCarthy.

[fol. 44] In Appellate Court of Illinois, First District

[Title omitted]

Petition for Certificate of Importance and Appeal to Supreme Court—Filed Jan. 7, 1936

Now comes M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, appellant, by Glenn, Schwartz, Real & Browning, his attorneys, and petitions this Honorable Court for leave to appeal from the judgment of affirmance by this Court in this cause to the Supreme Court of Illinois; petitions this Court to certify this cause by its Certificate of Importance to the Supreme Court of Illinois, to be passed upon by the Supreme Court, and shows unto the Court these reasons why the petition should be allowed:

1. That the construction and enforcement of the liability [fol. 45] created by a Federal Statute (Sections 64 and 66, Title 12, U. S. C. A.) is involved.

2. That the construction and validity of Section 71, Chapter 3, Illinois Revised Statutes of 1935 is impliedly involved in this suit.

3. That there are in excess of 15 national banking institutions in Chicago, Illinois, and many others throughout the entire State which are in process of liquidation; that assessments have been made against stockholders in each of these instances; that each of said institutions has at least one or more cases where the assessment was made against representatives of decedent's estates more than one year after granting of Letters; that each of said institutions and their stockholders are interested in the decision of the Court in this cause.

4. That there are now pending in the Probate Court of Cook County numerous suits where the identical questions as exist in this record are at issue, many of which involve in excess of $1,500.

Petitioner submits that this cause thereby involves questions of such importance on account of principal and collateral interest that it should be passed upon by the Supreme Court of Illinois.

Appellant therefore prays that this Court certify this cause to the Supreme Court of Illinois to be there passed upon; that leave to appeal be allowed to the Supreme Court, and that this Court fix the time within which appellant shall execute and file a sufficient appeal bond, if any, and the amount thereof.

M. J. Pufahl, as Receiver of the Austin National Bank, Appellant-Petitioner, by Glenn, Schwartz, Real & Browning, Attorneys for Petitioner.

[fol. 46] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER DENYING MOTION FOR CERTIFICATE OF IMPORTANCE AND APPEAL—Jan. 8, 1936

The Court having considered the motion of Appellant for a Certificate of Importance and an Appeal to the Su-

preme Court of Illinois in said cause as per petition filed herein, and being now fully advised in the premises doth order that said motion be and the same is hereby denied.

[fol. 47] IN APPELLATE COURT OF ILLINOIS

ORDER IN RE PUBLICATION OF WRITTEN DECISION OF THIS COURT—Jan. 14, 1936

It is hereby ordered that the cases, the numbers and titles of which are given below, the written decisions of this Court filed the 27th day of December A. D. 1935, shall be published in full in the Appellate Court Reports.

And the decisions so filed which are not designated below shall be published by including an adequate abstract of such written decisions.

38123: Parks and Pufahl vs. Estate of Parks.

[fol. 48] IN APPELLATE COURT OF ILLINOIS

38123

In Re Estate of ELVIRA J. PARKS, Deceased,

M. J. PUFAHL, as Receiver of the Austin National Bank of Chicago, Claimant Below, Appellant,

v.

Estate of ELVIRA J. PARKS, Deceased, Respondent Below, Appellee

Appeal from Circuit Court Cook County

OPINION—Filed Dec. 27, 1935

MR. JUSTICE DENIS E. SULLIVAN Delivered the Opinion of the Court:

This is an appeal from a judgment entered in the Circuit Court of Cook County, denying the claim of M. J. Pufahl, as receiver of the Austin National Bank of Chicago, against Philip W. Huston also called Houston, and Frank M. Pray, as executors of the estate of Elvira J. Parks, deceased.

The cause of action arose out of an assessment by the comptroller of currency of the United States against all shareholders of the Austin National Bank of Chicago, to enforce the superadded liability of the shareholders, including Philip W. Huston and Frank M. Pray, as executors, who are the owners and holders of 12 shares of the capital stock of the Austin National Bank.

The Circuit Court found that Philip W. Huston and Frank M. Pray, as executors of the estate of Elvira J. Parks, deceased, were liable to M. J. Pufahl, as receiver, for the sum of $1200 plus interest, to the extent of the property and funds in their hands as such executors.

The Circuit Court further found that the claim did not accrue and was not filed in the Probate Court until after the one year period for filing claims had expired and that consequently, claimant was barred from sharing in the funds of the estate, except as to uninventoried assets. M. J. Pufahl, as receiver, appealed from the entire judgment. [fol. 49] The theory of M. J. Pufahl, as receiver, is that the liability of the executors of the estate of Elvira J. Parks, deceased, for the stock assessment levied against them as the owners and holders of 12 shares of stock, arises by virtue of Section 5152 of the Revised Statutes of the United States (12 U. S. C. A. Sec. 66) and binds them the same as the deceased would be bound if living, and is not such an ordinary claim as would be barred by Chapter 3, par. 71, Section 70, Illinois Revised Statutes, 1935.

It is further contended by claimant that section 71 of the Administration of Estates Act was not designed to bar a claim arising by virtue of the federal statute which was not absolute and which did not accrue until after the one year period for filing claims had expired.

Elvira J. Parks who owned these shares of stock in her life time, died March 20, 1928. Philip W. Huston and Frank M. Pray, as executors, are now the owners and holders of the 12 shares of capital stock of the Austin National Bank of Chicago at the par value of $100 each.

On the 30th day of March, 1931, the comptroller of currency of the United States declared and adjudged said Austin National Bank of Chicago to be insolvent and closed said bank. Subsequently, on April 6, 1931, M. J. Pufahl was appointed receiver of said bank by the comptroller of currency of the United States.

May 21, 1931, the comptroller of currency in order to pay the debts of the Austin National Bank of Chicago made an assessment upon all the stockholders of said bank equal to 100 per cent of the par value of the stock of said bank owned by said stockholders, including an assessment of $1200 against the defendants, Philip W. Huston and Frank M. Pray, as executors of the last will and testament of Elvira J. Parks, and the said comptroller of currency de- [fol. 50] manded of the said Philip W. Huston and Frank M. Pray the payment of said stock assessment as aforesaid, together with interest at the rate of 5% per annum from June 29, 1931, and the said executors refused to pay M. J. Pufahl, as receiver, the amount due or any part thereof.

On May 21, 1931, the said comptroller of currency directed M. J. Pufahl, as receiver of the Austin National Bank of Chicago, to take the necessary proceedings to enforce the assessment levied against the capital stock of said bank.

On May 17, 1928, letters of administration were issued to Philip W. Huston and Frank M. Pray by the Probate Court, in a proceeding pending therein entitled, "In the matter of the Estate of Elvira J. Parks, deceased". It was stipulated that an inventory and supplemental inventory were filed in the Probate Court of Cook County one year from the date of issuance of letters testamentary, and that the said estate is still open and there has been no final distribution.

On September 1, 1933, M. J. Pufahl, as receiver, filed his claim against the Estate of Elvira J. Parks in the Probate Court for the sum of $1327.17, being $1200 assessment plus interest at the rate of 5 per cent to date of filing said claim.

The only point of controversy involved here is whether the comptroller of the currency by levying the assessment against the stockholders is in any different position than any other creditors filing their claims against the estate.

Chapter 3, par. 71, section 70 of the Illinois Revised Statutes, 1935, which is applicable to this question, reads as follows:

"All claims and demands of whatever class not exhibited to the Court within one year from the granting of letters as aforesaid shall be forever barred as to property and estate of the deceased which has been inventoried or ac-

counted for by the executor or administrator * * * all claims not exhibited to the court prior to the date so fixed shall be forever barred as to the property and estate listed in such inventory, and the amount remaining due on all [fol. 51] claims exhibited to the court on or prior to the day so fixed upon as aforesaid, including those filed within one year from the granting of letters, shall be paid *pro rata* out of such subsequently inventoried estate. * * *"

It is contended by the claimant that the Federal Statute (Section 66 of Title 12, United States Code Annotated) creates a special class of claim which is charged as a lien upon the estate of the deceased stockholder, and which is not governed by the laws of Illinois relative to the administration of estates of decedents.

It may well be admitted that the validity of the claim cannot be affected in any way by the laws of the state, but as to the method of its enforcement, it is governed by the practice prescribed by the state laws, the same as any other claimant. We are inclined to believe this exact question was settled by the Supreme Court of the United States on February 4, 1933, in the case of Forrest v. Jack, 294 U. S. Rep. 159, on page 163 referring to the said section 66 of Title 12, United States Code Annotated, wherein the court said:

"In the absence of federal enactments relating to procedure for enforcement of the liability imposed by Section 66, collection is to be made in accordance with state laws governing claims against estates of deceased persons, at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority."

and again the court said:

"There is no suggestion that the laws of the State of Utah discriminate against or are inadequate for the just and convenient enforcement of liability imposed."

In other words, this liability which was created by the comptroller of the currency more than one year after the time when claims could be filed under the law of Illinois, is treated the same as any other claim and we think rightfully so. No discrimination is made against it nor can we see any reason why it should be preferred over other claims.

No exception in its favor is made in any law and we do not [fol. 52] see why we should attempt to make one.

We are of the opinion that the finding of the Circuit Court is correct and its order and judgment are, therefore, affirmed.

Order and judgment affirmed.

Hall, P. J., and Hebil, J., concur.

[fol. 53 & 54] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 55] IN APPELLATE COURT OF ILLINOIS

EXCERPT FROM APPELLANT'S BRIEF—Filed March 28, 1935

The only point heretofore raised by the defendants has been that Section 70 of the Administration of Estates Act bars this claim from being enforced against the estate in their hands, because the claim accrued after the one-year limitation period had expired.

Assignments of Error

The claimant, M. J. Pufahl, as receiver of the Austin National Bank of Chicago, alleges that:

(1) The trial court erred in holding that a claim arising under Sections 64 and 66 of the United States Code Annotated Title 12, which accrued after the one-year period for filing claims as established by Section 70 of the Administration of Estates Act, is barred from sharing in inventoried assets.

(2) The court erred in refusing to hold that a claim by the receiver of a national bank for the enforcement of national bank stock liability is not an ordinary claim and is not barred by Section 70 of the Administration of Estates Act from sharing in inventoried assets of the estate of Elvira J. Parks, deceased.

(3) The Circuit Court erred in refusing to hold that Section 70 of the act of the State of Illinois in regard to the

administration of estates, in force January 1, 1872, as amended, is unconstitutional and void in so far as it is construed to bar a claim arising out of an assessment by the comptroller of the currency on shares of stock held by the executors of the estate of Elvira J. Parks, deceased, where the bank failed and the assessment was levied by the comptroller of the currency after the one-year limitation for filing claims against the estate had expired.

[fol. 56] I, Sheldon W. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois, and keeper of the records, files and seal thereof, Do Hereby Certify, That the foregoing is a true copy of page three incorporated in Appellant's brief heretofore filed herein in said Appellate Court in the above entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 7th day of February, in the year of our Lord one thousand nine hundred and Thirty-six.

Sheldon W. Govier, Clerk of the Appellate Court of the First District, Illinois. (Seal Appellate Court of Illinois, First District.)

[fol. 57] [File endorsement omitted.]

(7456-C)

Stipulation and Addition to Record

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 864

M. J. PUFAHL, as Receiver of the Austin National Bank of Chicago, Petitioner,

vs.

Estate of ELVIRA J. PARKS, Deceased

STIPULATION

It is hereby stipulated by and between petitioner, M. J. Pufahl, as Receiver of Austin National Bank, by Otis F. Glenn, his attorney, and respondents, Philip W. Huston and Frank M. Pray, as Executors of Estate of Elvira J. Parks, deceased, by Emmett J. McCarthy, their attorney, that there are inventoried assets in the hands of said executors far in excess of the amount of the claim of petitioner and that said estate is solvent.

It is further stipulated that there are no uninventoried assets discovered subsequent to expiration of one year from granting of Letters Testamentary.

Otis F. Glenn, Attorney for Petitioner. Emmett J. McCarthy, Attorney for Respondents.

[Endorsed:] No. —. Supreme Court of the United States, October Term, 1935. M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, Petitioner, vs. Estate of Elvira J. Parks, Deceased. Stipulation. Law Offices Glenn, Schwartz, Real & Browning, 134 S. La Salle Street, Dearborn 3700, Chicago, Illinois.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 27, 1936

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, 1st District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Ct. U. S.
MAR 27
CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1935.

No. [redacted] 18

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, A CORPORATION, *Petitioner*,

v.

ESTATE OF ELVIRA J. PARKS, DECEASED, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

OTIS F. GLENN,
GEORGE P. BARSE,
J. H. BREWER, JR.,
Attorneys for Petitioner.

R. G. REAL,
HAROLD E. BAILY,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1935.

No.

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, A CORPORATION, *Petitioner*,

v.

ESTATE OF ELVIRA J. PARKS, DECEASED, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, Illinois, by direction of the Comptroller of the Currency, respectfully prays that a writ of certiorari issue to review the judgment and decree of the Appellate Court of the First District of the State of Illinois rendered in the above case on December 27, 1935 (R. 20-24), reported in 283 Ill. App. 95.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The petitioner, M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, instituted proceedings in the Probate Court of Cook County, Illinois, on September 1, 1933 (R. 10) to enforce collection of an assessment in the sum of $1,200.00 on national bank stock owned by the respondents, Philip W. Huston and Frank M. Pray, as Executors of the Estate of Elvira J. Parks, deceased. The Probate Court denied the claim of the petitioner (R. 4), and upon appeal to the Circuit Court of Cook County, Illinois, the case was tried *de novo* and without formal pleadings, in accordance with the Illinois practice. Judgment was entered in the Circuit Court disallowing the claim of the petitioner as against the undistributed assets of the estate inventoried within one year from the date of granting of letters testamentary, but allowing said claim as to assets not inventoried within the year (R. 7). On appeal to the Appellate Court, First District, State of Illinois, the judgment of the Circuit Court was affirmed (R. 17, 24). Petition for certificate of importance for leave to appeal to the Supreme Court of Illinois was denied January 8, 1936 (R. 19, 20).

II.

THE FACTS.

The facts as stipulated by the parties (R. 9-11) are substantially as follows:

On March 30, 1931, the Comptroller of the Currency of the United States declared the Austin National Bank to be insolvent, and thereupon closed said bank. On April 6, 1931, the Comptroller of the Currency appointed M. J. Pufahl as Receiver of said bank (R. 9).

On May 21, 1931, the Comptroller of the Currency made an assessment upon all the stockholders of said bank equal

to 100 per cent of the par value of the stock of said bank owned by each of said stockholders, including an assessment against the respondents, Philip W. Huston and Frank M. Pray, as Executors of the Last Will and Testament of Elvira J. Parks, in the amount of $1,200.00, said assessment being in the sum of $100.00 per share on twelve shares of the capital stock of said bank (R. 9).

The Comptroller of the Currency made a demand upon the respondents for the payment of the assessment, as aforesaid, together with interest. Upon the refusal of the respondents to pay said assessment, these proceedings to enforce the assessment were instituted (R. 10).

Elvira J. Parks died March 20, 1928, and at the time of her death she was the owner of twelve shares of capital stock of the Austin National Bank. Letters of Administration were issued by the Probate Court of Cook County, Illinois, to Philip W. Huston and Frank M. Pray on *May 17, 1928,* in the administration proceeding pending therein, entitled "In the matter of the Estate of Elvira J. Parks, deceased". An Inventory and Supplemental Inventory were filed in the Probate Court within one year after the date of issuance of Letters Testamentary.

It will be noted that this Inventory had already been filed (R. 10) approximately two years before the assessment was levied by the Comptroller. However, notwithstanding such Inventory, there has been no final distribution and the estate is still open (R. 10).

An additional stipulation (R. 26) provides:

> "It is hereby stipulated by and between the petitioner M. J. Pufahl as Receiver of the Austin National Bank, Chicago by Otis F. Glenn, his attorney, and respondents, Philip W. Huston and Frank M. Pray as Executors of the estate of Elvira J. Parks, deceased, by Emmett J. McCarthy, their attorney, that there are inventoried assets in the hands of said Executors far in excess of the amount of the claim of the petitioner and that said estate is solvent. It is further stipulated

that there are no uninventoried assets discovered subsequent to expiration of one year from the date of granting of Letters Testamentary.

OTIS F. GLENN,
Attorney for Petitioner.

EMMETT J. McCARTHY,
Attorney for Respondents."

III.

STATUTES INVOLVED.

Section 64, Title 12, U. S. C. A., provides in part as follows:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof, in addition to the amount invested in such stock * * *."

Section 66, Title 12, U. S. C. A., provides:

> "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be, if living and competent to act and hold the stock in his own name."

Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), provides in part as follows:

> "All demands against the estate of any testator or intestate shall be divided in classes in manner following, to wit:
>
> "First. Funeral expenses and necessary costs of administration.
>
> * * * * * * * * *

"Sixth. All other debts and demands of whatever kind without regard to quality or dignity, which shall be exhibited to the court *within one year from granting of letters as aforesaid.* (Italics inserted)

"All claims and demands of whatever class *not* exhibited to the court *within one year from the granting of letters as aforesaid shall be forever barred as to property and estate of the deceased which has been inventoried or accounted* for by the executor or administrator; and if the executor or administrator shall thereafter file any inventory listing other estate not previously inventoried or accounted for and shall cause notice to be published in the manner provided by Section 60 of this act, or give such other notice as the court may direct, of a day fixed upon, which shall not be less than three months after the date of such first publication, for the filing and exhibiting of further claims against said decedent, all claims not exhibited to the court prior to the date so fixed shall be forever barred as to the property and estate listed in such inventory, and the amount remaining due on all claims exhibited to the court on or prior to the day so fixed upon as aforesaid, including those filed within one year from the granting of letters shall be paid pro rata out of such subsequently inventoried estate, saving, however, to infants, persons of unsound mind and persons in the employment of the United States or of this state and residing outside of the United States the term of one year after their respective disabilities are removed to exhibit their claims." (As amended by Act approved June 30, 1933) (Italics inserted)

IV.

DECISIONS OF THE CIRCUIT COURT AND APPELLATE COURT OF ILLINOIS.

The Circuit Court of Cook County, Illinois, found that the respondents, Philip W. Huston and Frank M. Pray, as Executors of the estate of Elvira J. Parks, deceased, are the owners and holders of twelve shares of the capital stock of the Austin National Bank of Chicago of the par value of

$100.00 each (R. 6). The court entered judgment allowing the claim of petitioner against uninventoried assets of the estate of Elvira J. Parks, deceased, but disallowing and rejecting said claim as against assets inventoried within one year from the granting of Letters Testamentary (R. 7; opinion and findings not reported.)

The Appellate Court of Illinois affirmed the Circuit Court (R. 17-24; opinion reported 283 Ill. App. 95), and held that the liability created by Section 66, Title 12, U. S. C., constituted an ordinary claim against the estate of the deceased; that Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), barred its enforcement against inventoried assets (R. 23). The court further held that the decision in the case of *Forrest* v. *Jack,* 294 U. S. 158, was applicable and controlling in this case (R. 23).

V.

QUESTIONS PRESENTED.

1. Can the liability for a stock assessment arising under the National Banking Act (Sections 64 and 66, Title 12, U. S. C.) be enforced against the inventoried assets in the possession of the executors of a decedent's estate in process of administration where the liability did not accrue and the claim thereon could not be filed until after the expiration of the one year limitation period for filing claims specified by Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), which provides that claims against estates of decedents filed after one year from the granting of Letters of Administration cannot share in the inventoried assets?

2. Is a claim such as the assessment claim in question within the purview of Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), and hence excluded from assertion against the undistributed inventoried assets of the estate in the hands

of the executors, as provided for by Section 66, Title 12, U. S. C.?

3. Is the Illinois Non-Claim Statute (Section 70, of the Illinois Administration Act; Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), which bars and excludes from participation in the inventoried assets of the estate of a decedent, claims which have not been filed within one year from the granting of Letters Testamentary or Letters of Administration, effective to bar an assessment claim under the National Banking Laws (Sections 64 and 66, Title 12, U. S. C.), which does not arise until after the expiration of the period prescribed by such statute for the filing of claims and where, further, notwithstanding the expiration of such period for filing claims, there has been no final distribution and the estate is still open?

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner believes that the writ of certiorari should be granted because:

(a) The Appellate Court of the First District of the State of Illinois has decided an important question of Federal law dealing with the administration of insolvent national banks which has not been, but which should be, settled by this Honorable Court, involving the construction of Federal statutes, (12 U. S. C., Sections 64 and 66), of utmost importance in the administration of laws applicable to national banks in liquidation; and that the decision of the court is untenable in that it held, by virtue of the provisions of the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), that the inventoried assets of the estate of Elvira J. Parks, deceased, in the hands of the Executors for distribution were relieved from the stock assessment liability imposed by Sections 64 and 66, Title 12, U. S. C., because the period prescribed for filing claims

against the estate had expired prior to the time of the accrual of the said claim, although the estate was still in the process of administration.

The state court based its holding on the decision of this court in *Forrest* v. *Jack,* 294 U. S. 158. It is respectfully submitted that the holding in that case decides only that where the estate has been *extinguished* under state laws, the liability subsequently arising under Sections 64 and 66, Title 12, U. S. C., cannot be enforced. However, in the case at bar the estate is still open and in process of administration, and as shown by the stipulation (R. 26) there are undistributed inventoried assets of the estate in the hands of the Executors, valued far in excess of the assessment claim, which clearly distinguishes it from *Forrest* v. *Jack, supra.* See also *Seabury* v. *Green,* 294 U. S. 165, 169.

(b) The decision and judgment of the Appellate Court of the First District of the State of Illinois ((in holding that the liability imposed by the Federal law (Section 66, Title 12, U. S. C.) which accrued after the time for filing claims against the estate had expired, was barred by the operation of the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), even though the estate was still in process of administration and undistributed inventoried assets of value far in excess of the assessment claim were still in the hands of the Executor)) is in conflict with the principles established by this Honorable Court in *Forrest* v. *Jack,* 294 U. S. 158, 162, 163; *Seabury* v. *Green,* 294 U. S. 165, 168, 169; *Matteson* v. *Dent,* 176 U. S. 521, 524; and decisions of other courts as follows: *Zimmerman* v. *Carpenter,* 84 Fed. 747, 750, 751; *Parker* v. *Robinson,* (C. C. A. 1), 71 Fed. 256, 257; *Rankin* v. *Miller,* 207 Fed. 602, 612; *Drain* v. *Stough,* (C. C. A. 9), 61 Fed. (2d) 668, 669; *Luce* v. *Thompson,* (C. C. A. 8), 36 Fed. (2d) 183, 184, 185; *Gilbertson* v. *McCarthy,* (C. C. A. 8), 32 Fed. (2d) 665, 667, 668; *Mortimer* v. *Potter,* 72 N. E. 817, 818; 213 Ill. 178. Compare *Mann* v. *Kleisdorff,* (C. C. A. 5), 16 Fed. (2d) 997, 998.

WHEREFORE, it is respectfully prayed that this petition for writ of certiorari be granted.

OTIS F. GLENN,
GEORGE P. BARSE,
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IN THE

Supreme Court of the United States

October Term, 1935.

No. .....

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, A CORPORATION, *Petitioner*,

v.

ESTATE OF ELVIRA J. PARKS, DECEASED, *Respondent*.

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS OF COURTS BELOW.

The findings of fact, conclusions of law, and judgment of the Circuit Court of Cook County, Illinois, are set out in the Record at pages 5, 6 and 7 and are not reported. The opinion of the Appellate Court of the First District of Illinois is found in the Record at pages 20-24, and is reported in 283 Ill. App. 95.

II.

JURISDICTION.

The judgment of the Appellate Court of Illinois was entered December 27, 1935 (R. 17). A timely petition for certificate of importance for leave to appeal to the Supreme Court of Illinois was denied January 8, 1936 (R. 19, 20). Since this case involves less than $1,500.00 (R. 6), an application could not be made to the Illinois Supreme Court for

leave to appeal in accordance with the requirements of the Illinois Practice Act of 1933, (Illinois State Bar Statutes, Ch. 110, Par. 203 (2) 1935) the pertinent portions of which are set out in the Appendix at p. 17. The judgment of the Appellate Court is now a final judgment of the highest court in the State of Illinois in which a decision could be had.

The jurisdiction of this court is invoked to review the cause by writ of certiorari under Section 237 (b) of the Judicial Code, (U. S. C., Title 28, Ch. 9, Sec. 344 (b)), providing for the granting of a writ of certiorari by this court to review a final judgment or decree of the highest court of a state in which a decision could be had in a suit in which a right, title or privilege is claimed under a statute of the United States.

The Receiver, (Petitioner herein), claimed the right to collect the assessment from the Executors under Sections 64 and 66, Title 12, U. S. C., and this right was denied by the state court. Hence, a Federal question is involved. *Seabury* v. *Green*, 294 U. S. 165, 168.

III.

STATEMENT OF THE CASE.

A statement of the case is set out in the foregoing petition under the captions "Summary Statement of the Matters Involved", and "The Facts", to which reference is here made.

IV.

SPECIFICATION OF ERRORS.

The Appellate Court erred in holding that the liability created by Sections 64 and 66, Title 12, U. S. C. is not a liability against Philip W. Huston and Frank M. Pray, as Executors, enforceable against the inventoried assets in their hands belonging to the estate of Elvira J. Parks, deceased.

The Appellate Court erred in holding that the undistributed inventoried property and funds of the deceased share-

holder in the hands of the Executors were relieved from the liability imposed by the Federal law, (Sections 64 and 66, Title 12, U. S. C.), by reason of the provisions of the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), requiring claims to be filed against the estate within one year from the granting of letters testamentary, in order to share in the inventoried assets; notwithstanding the estate was still in process of administration, and the assessment claim did not accrue until after the time to file claims had expired.

V.

ARGUMENT.

Section 66, Title 12, U. S. C., expressly provides that the estates and funds in the hands of persons holding stock as executors shall be liable for stock assessment in like manner and to the same extent as the testator would be, if living and competent to act and hold the stock in his own name. This provision shows a clear intent on the part of Congress that the liability, as limited and defined by Section 66, Title 12, U. S. C., shall extend to the estate of a deceased shareholder for the benefit of the creditors of an insolvent national bank. The fiduciaries are exempt, *but the property belonging to the estate in their hands is liable*, as would be the deceased, if living.

Forrest v. *Jack*, 294 U. S. 158, 162;
Seabury v. *Green*, 294 U. S. 165, 168;
Matteson v. *Dent*, 176 U. S. 521, 524;
Zimmerman v. *Carpenter*, 84 Fed. 747, 751;
Drain v. *Stough*, (C. C. A. 9), 61 Fed. (2d) 668, 669.

This obligation of the estate continues unimpaired until valid assignment of the shares by final distribution of the estate, if not by an earlier transfer.

Forrest v. *Jack*, 294 U. S. 158, 163;
Seabury v. *Green*, 294 U. S. 165, 169.

The state court was of the opinion that the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Sec. 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), barring all claims not filed against the estate within one year, relieved the estate and the inventoried assets in the hands of the Executors from the obligation and liability imposed by Section 66, Title 12, U. S. C., although the liability did not accrue until after the time prescribed for filing claims, and the estate was still in process of administration.

The effect of this decision, upon the facts of the case, is to allow a state Non-Claim Statute to discriminate against the just and convenient enforcement of the liability imposed by the Federal law (Sec. 66, Title 12, U. S. C.) against estates of deceased stockholders which are in process of administration, when there has been no final distribution of the property and the estate is not extinguished. The contingent assessment liability of the estate ripened into absolute liability when the assessment was levied, regardless of the effect of the Non-Claim Statute on claims of ordinary creditors.

If this decision is allowed to stand, the effect of the state Non-Claim Statute has completely thwarted and nullified the enforcement of a liability imposed by Sections 64 and 66, Title 12, U. S. C., which is contrary to settled principles of law as established by this Honorable Court.

> *Forrest* v. *Jack,* 294 U. S. 158, 163;
> *Scabury* v. *Green,* 294 U. S. 165, 169;
> *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283, 284;
>
> *Easton* v. *Iowa,* 188 U. S. 220, 229.

> "The power of the nation within the field of its legitimate exercise overrides in the case of conflict the power of the states."
>
> *Jennings* v. *U. S. F. & G. Co.,* 294 U. S. 216, 226.

Zimmerman v. *Carpenter,* 84 Fed. 747, (cited with approval by this court in *Forrest* v. *Jack, supra*), is conclu-

sive here. There, the time within which a stock assessment claim could be presented against the estate of the deceased, in accordance with state law, expired in December, 1895. The bank failed in November, 1896, the assessment was levied in February, 1897, and became due one month later. It was contended that the claim was barred by the statute of South Dakota fixing the time within which claims could be presented. The court said at page 750:

> "Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of Charles C. Carpenter, deceased, to be presented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever barred by the statute of nonclaim of said state, involves a total misconception of the object, meaning, and effect of sections 5151, 5152, Rev. St. U. S." (Sections 64 and 66, Title 12, U. S. C.) (Parenthesis inserted)

and further at page 751:

> "But congress intended to, and did, provide that the estate of the testator or intestate, *in the hands of an executor or administrator,* should be liable in like manner, and to the same extent, as the testator or intestate would be if living, and competent to act, and hold the stock. By the language of the section last referred to, the death of the testator or intestate does not in any way affect the liability of the estate of the testator or intestate, except, *if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged.* On the 23d day of November, 1896, when the Dakota National Bank failed, Frances G. Carpenter, as the executrix of the estate of Charles C. Carpenter, deceased, under the laws of the United States and of South Dakota, was a shareholder therein. To the extent of 100 per cent. of the par value of the stock held by her, the estate of Charles C. Carpenter in her hands on that day was liable; not as if Carpenter was dead, but in the same manner, and to the same extent, as if he was living; the clear object of the statute being to make the estate

liable for a debt arising after the death of a testator or intestate, as well as those arising before. On the 23d day of November, 1896, so much of the estate of Charles C. Carpenter, deceased, which was in the possession of defendant, as executrix of said Carpenter, on that day, stood not as the estate of a deceased person with reference to the liability on said stock, but in the place of Charles C. Carpenter himself, liable in like manner and to the same extent as he (Carpenter) would have been if alive." (Italics inserted)

See also:

Parker v. *Robinson*, (C. C. A. 1), 71 Fed. 256, 257;
Drain v. *Stough*, (C. C. A. 9), 61 Fed. (2d) 668, 669;
Davis v. *Weed*, 7 Fed. Cases 186, 190;
Luce v. *Thompson*, (C. C. A. 8), 36 Fed. (2d) 183, 184, 185;
Gilbertson v. *McCarthy*, (C. C. A. 8), 32 Fed. (2d) 665, 667, 668.
Mortimer v. *Potter*, 72 N. E. 817, 818; 213 Ill. 178.
Compare *Mann* v. *Kleisdorff*, (C. C. A. 5), 16 Fed. (2d) 997, 998.

It is therefore submitted that the effect of the decision in this case is to defeat the enforcement of the stockholder's liability as provided by Sections 64 and 66, Title 12, U. S. C., and deprive the creditors of a national bank in many instances of the protection which Congress undoubtedly intended to be theirs. The Executors held this stock for three years after the death of testatrix and prior to the assessment. The estate received the benefits of the ownership of the stock during this period, and should now share the assessment with the other stockholders.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities demonstrates that the decision of the court below is erroneous. It is earnestly urged in the interest not only of uniformity in the administration of insolvent

national banks throughout all the states, but also in the interest of settling the law conclusively upon the issues involved, that this Honorable Court entertain a review of this case on writ of certiorari, and it is respectfully submitted, in the light of the reasons indicated, that the petition should be granted.

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APPENDIX.

Jurisdiction of Appellate and Supreme Courts.

Chapter 110, Par. 203 (2), Illinois State Bar Statutes, 1935:

"Appeals shall be taken * * in all cases in which their jurisdiction is invoked pursuant to law except those wherever appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts shall be final, subject, however, to the following exceptions:

"(1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting such appeal.

"(2) In any such case as hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case and with like effect, as if it had been carried by appeal to the said Supreme Court: *Provided, however,* * * * in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00) * * *."

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v.

ESTATE OF ELVIRA J. PARKS, Deceased, *Respondent*.

BRIEF OF PETITIONER.

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(A) The contingent assessment liability of Elvira J. Parks upon 12 shares of stock of the Austin National Bank of Chicago standing in her name survived her death and consequently the estate remained liable and the contingent assessment liability ripened into absolute liability when the assessment was levied on May 21, 1931, at which time the estate was still in process of administration and undistributed inventoried assets of value far in excess of the assessment claim were and are in the hands of the executors. Section 5152, U. S. R. S. (Title 12, U. S. C., Sec.66) expressly provides that the estates and funds in the hands of persons holding stock as executors shall be liable for stock assessment in like manner and to the same extent as the testator would be, if living and competent to act and hold the stock in his own name. This provision shows a clear intent on the part of Congress that the liability, as limited and defined by Section 66, Title 12, U. S. C., shall extend to the estate of a deceased shareholder for the bene-

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fit of the creditors of an insolvent national bank. The fiduciaries are exempt, *but the property belonging to the estate in their hands is liable,* as would be the deceased, if living.

This obligation of the estate continues unimpaired until valid assignment of the shares by final distribution of the estate..... 8

(B) The Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes 1935; Sec. 70 Ill. Adm. Act), providing that claims of any class not exhibited to the court within one year from the granting of Letters of Administration shall be forever barred from sharing in the distribution of the inventoried assets, does not relieve the estate and the undistributed inventoried assets in the hands of the executors from the obligation and liability for stock assessment imposed by the Federal law. (Sec. 66, Title 12, U. S. C.) 10

(C) The enforcement of the liability imposed by Section 66, Title 12, U. S. C., may not be thwarted or impeded by state law which discriminates against or is inadequate for the just and convenient collection of the amount of the assessment. To require the petitioner to collect his claim in accordance with the laws of Illinois governing claims against estates of deceased persons, would compel him to proceed in a manner inadequate for the just and convenient enforcement of a liability specifically imposed by the Federal statute, (Sec. 66, Title 12, U. S. C.), thus discriminating against and impeding the collection of a liability imposed by the national authority 22

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BRIEF OF PETITIONER.

I.

OPINIONS AND JUDGMENT BELOW.

The opinion of the Appellate Court, First District, State of Illinois, is reported in 283 Ill. App. 95, and appears in the record at pages 20 to 24. The special findings of fact, propositions at law, and judgment of the Circuit Court of Cook County are not reported, but appear in the record at pages 5, 6 and 7.

II.

JURISDICTION.

Writ of certiorari was granted on the 27th day of April, 1936 (R. 27), under Section 237 (b) of the Judicial Code, (U. S. C., Title 28, Ch. 9, Sec. 344 (b)), providing for the

granting of a writ of certiorari by this court to review a final judgment or decree of the highest court of a State in which a decision could be had in a suit:

> "where any title, right, privilege, or immunity, is specially set up or claimed by either party under the Constitution, or any treaty or statute of * * * the United States; and the power to review under this paragraph may be exercised as well where the said claim is sustained as where it is denied * * *."

Determination of the issue of whether the estate of Elvira J. Parks and the undistributed inventoried assets of said estate in the hands of the executors are liable for the stock assessment is clearly a Federal question involving the construction of the assessment statutes, (Sections 64 and 66, Ch. 2, Title 12, U. S. C.). (Appendix pp. 30-31.)

In *Seabury* v. *Green*, 294 U. S. 165, at page 168, this court said:

> "Respondent maintains that no Federal question is involved. To the extent that the opinion implies that liability of stockholders of national banks is a creature of or depends upon a statute of South Carolina, the suggestion is so plainly without foundation as to suggest that it must have been inadvertently made. The court's ruling that the estate is not liable for the assessment necessarily depends upon its construction of Section 66. The judgment is reviewable here under Section 237 (b), Judicial Code."

III.

STATEMENT OF THE CASE.

The petitioner, M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, Illinois, instituted proceedings in the Probate Court of Cook County, Illinois, on September 1, 1933, (R. 10) to enforce collection of an assessment in the sum of $1,200.00 on national bank stock owned by the respondents, Philip W. Huston and Frank M. Pray, as ex-

ecutors of the estate of Elvira J. Parks, deceased, as the estate was still open and there had been no final distribution thereof, (R. 10) and according to the stipulation (R. 26) there were inventoried assets in the hands of the executors, the value of which exceeded the amount of the claim of the petitioner. The Probate Court denied the claim of the petitioner, (R. 4) and upon appeal to the Circuit Court of Cook County, Illinois, the case was tried *de novo* and without formal pleadings, in accordance with the Illinois practice. Judgment was entered in the Circuit Court disallowing the claim of the petitioner as against the undistributed assets of the estate inventoried within one year from the date of granting of Letters Testamentary, but allowing said claim as to assets not inventoried within the year (R. 7). (No additional assets were thereafter discovered or inventoried. R. 26) On appeal to the Appellate Court, First District, State of Illinois, the judgment of the Circuit Court was affirmed (R. 17, 24). Petition for certificate of importance for leave to appeal to the Supreme Court of Illinois was denied January 8, 1936 (R. 19, 20). Petition for writ of certiorari filed by the petitioner was granted by this court on the 27th day of April, 1936 (R. 27).

The facts as stipulated by the parties (R. 9-11) are substantially as follows:

On March 30, 1931, the Comptroller of the Currency of the United States declared the Austin National Bank to be insolvent, and thereupon closed said bank. On April 6, 1931, the Comptroller of the Currency appointed M. J. Pufahl as Receiver of said bank (R. 9).

On May 21, 1931, the Comptroller of the Currency made an assessment upon all the stockholders of said bank equal to 100 per cent of the par value of the stock of said bank owned by each of said stockholders, including an assessment against the respondents, Philip W. Huston and Frank M. Pray, as executors of the Last Will and Testament of Elvira J. Parks, in the amount of $1,200.00, said assessment being in the sum of $100.00 per share on twelve shares of the capital stock of said bank (R. 9).

The Comptroller of the Currency made a demand upon the respondents for the payment of the assessment, as aforesaid, together with interest. Upon the refusal of the respondents to pay said assessment, these proceedings to enforce the assessment were instituted (R. 10).

Elvira J. Parks died March 20, 1928, and at the time of her death she was the owner of twelve shares of capital stock of the Austin National Bank. Letters of Administration were issued by the Probate Court of Cook County, Illinois, to Philip W. Huston and Frank M. Pray on *May 17, 1928,* in the administration proceeding pending therein, entitled "In the matter of the Estate of Elvira J. Parks, deceased". An Inventory and Supplemental Inventory were filed in the Probate Court within one year after the date of issuance of Letters Testamentary (R. 10).

It will be noted that this Inventory had already been filed (R. 10) approximately two years before the assessment was levied by the Comptroller. *However, notwithstanding such Inventory, there has been no final distribution and the estate is still open* (R. 10).

An additional stipulation (R. 26) provides:

"It is hereby stipulated by and between the petitioner M. J. Pufahl as Receiver of the Austin National Bank, Chicago by Otis F. Glenn, his attorney, and respondents, Philip W. Huston and Frank M. Pray as Executors of the estate of Elvira J. Parks, deceased, by Emmett J. McCarthy, their attorney, that there are inventoried assets in the hands of said Executors far in excess of the amount of the claim of the petitioner and that said estate is solvent. It is further stipulated that there are no uninventoried assets discovered subsequent to expiration of one year from the date of granting of Letters Testamentary.

OTIS F. GLENN,
Attorney for Petitioner.

EMMETT J. MCCARTHY,
Attorney for Respondents."

IV.

SPECIFICATION OF ERRORS.

(a) The Appellate Court erred in holding that the liability created by Sections 64 and 66, Title 12, U. S. C. (Appendix pp. 30-31) is not a liability against Philip W. Huston and Frank M. Pray, as executors, enforceable against the inventoried assets in their hands belonging to the estate of Elvira J. Parks, deceased.

(b) The Appellate Court erred in holding that the undistributed inventoried property and funds of the deceased shareholder in the hands of the executors were relieved from the liabilty imposed by the Federal law, (Sections 64 and 66, Title 12, U. S. C.), (Appendix pp. 30-31), by reason of the provisions of the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), (Appendix p. 31), requiring claims to be filed against the estate within one year from the granting of Letters Testamentary, in order to share in the inventoried assets; notwithstanding the estate was still in process of administration, and the assessment claim did not accrue until after the time to file claim had expired.

V.

QUESTIONS PRESENTED.

1. Can the liability for a stock assessment arising under the National Banking Act, (Sections 64 and 66, Title 12, U. S. C.), (Appendix pp. 30-31), be enforced against the inventoried assets in the possession of the executors of a decedent's estate in process of administration where the liability did not accrue and the claim thereon could not be filed until after the expiration of the one year limitation period for filing claims specified by Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), (Appendix p. 31), which provides that claims against estates of decedents filed after one year

from the granting of Letters of Administration cannot share in the inventoried assets?

2. Is the Illinois Non-Claim Statute (Section 70, of the Illinois Administration Act; Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935, (Appendix p. 31), which bars and excludes from participation in the inventoried assets of the estate of a decedent, claims which have not been filed within one year from the granting of Letters Testamentary or Letters of Administration, effective to bar an assessment claim under the National Banking Laws, (Sections 64 and 66, Title 12, U. S. C.), (Appendix pp. 30-31), which does not arise until after the expiration of the period prescribed by such statute for the filing of claims and where, further, notwithstanding the expiration of such period for filing claims, there has been no final distribution and the estate is still open, and there are undistributed inventoried assets in the hands of the executors valued far in excess of the assessment claim?

VI.

STATUTES INVOLVED.

The statutes involved in the discussion of the case are set forth in the Appendix, *infra*, pages 30-32.

VII.

SUMMARY OF ARGUMENT.

A.

The contingent assessment liability of Elvira J. Parks upon 12 shares of stock of the Austin National Bank of Chicago standing in her name survived her death and consequently the estate remained liable and the contingent assessment liability ripened into absolute liability when the assessment was levied on May 21, 1931, at which time the estate was still in process of administration and undis-

tributed inventoried assets of value far in excess of the assessment claim were and are in the hands of the executors. Section 5152, U. S. R. S., (Title 12, U. S. C., Sec. 66), expressly provides that the estates and funds in the hands of persons holding stock as executors shall be liable for stock assessment in like manner and to the same extent as the testator would be, if living and competent to act and hold the stock in his own name. This provision shows a clear intent on the part of Congress that the liability, as limited and defined by Section 66, Title 12, U. S. C., shall extend to the estate of a deceased shareholder for the benefit of the creditors of an insolvent national bank. The fiduciaries are exempt, but the property belonging to the estate in their hands is liable, as would be the deceased, if living. This obligation of the estate continues unimpaired until valid assignment of the shares by final distribution of the estate.

B.

The Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes 1935; Sec. 70, Ill. Adm. Act), providing that claims of any class not exhibited to the court within one year from the granting of Letters of Administration shall be forever barred from sharing in the distribution of the inventoried assets, does not relieve the estate and the undistributed inventoried assets in the hands of the executors from the obligation and liability for stock assessment imposed by the Federal law. (Sec. 66, Title 12, U. S. C.)

C.

The enforcement of the liability imposed by Section 66, Title 12, U. S. C., may not be thwarted or impeded by state law which discriminates against or is inadequate for the just and convenient collection of the amount of the assessment. To require the petitioner to collect his claim in accordance with the laws of Illinois governing claims against estates of deceased persons, would compel him to proceed

in a manner inadequate for the just and convenient enforcement of a liability specifically imposed by the Federal statute, (Sec. 66, Title 12, U. S. C.), thus discriminating against and impeding the collection of a liability imposed by the national authority.

VIII.

ARGUMENT.

A.

The contingent assessment liability of Elvira J. Parks upon 12 shares of stock of the Austin National Bank of Chicago survived her death and consequently the estate remained liable and the contingent assessment liability ripened into absolute liability when the assessment was levied on May 21, 1931, at which time the estate was still in process of administration and undistributed inventoried assets of value far in excess of the assessment claim were and are in the hands of the executors. Section 5152, U. S. R. S., (Title 12, U. S. C., Sec. 66), expressly provides that the estates and funds in the hands of persons holding stock as executors shall be liable for stock assessment in like manner and to the same extent as the testator would be, if living and competent to act and hold the stock in his own name. This provision shows a clear intent on the part of Congress that the liability, as limited and defined by Section 66, Title 12, U. S. C., shall extend to the estate of a deceased shareholder for the benefit of the creditors of an insolvent national bank. The fiduciaries are exempt, but the property belonging to the estate in their hands is liable, as would be the deceased, if living. This obligation of the estate continues unimpaired until valid assignment of the shares by final distribution of the estate.

The liability of estates for stock assessment as limited and defined by Sec. 66, Title 12, U. S. C., (Appendix p. 31)

has been universally recognized by decisions of this and other Federal courts. In the recently decided case of *Forrest* v. *Jack*, 294 U. S. 158, it was said at page 162 as follows:

> "The liability of stockholders is based upon the statute, Sec. 64. As a general rule, the person in whose name the stock stands on the books of the bank is liable, but the actual owner may be held although the stock has not been registered in his name. The liability does not altogether cease on the death of the owner but, as limited and defined by Sec. 66, attaches to his estate. The fiduciaries are exempt but the property belonging to the estate is liable as would be the deceased if living. No cause of action arises until the assessment is made by the Comptroller and, so far as concerns the need and amount, his findings are conclusive. He acts under Federal authority, and in respect of determinations, orders and assessments may not be trammeled, controlled or prevented by state laws."

In *Seabury* v. *Green*, *supra*, at page 169, it was said:

> "The obligation continues unimpaired until valid assignment of the shares by final distribution of the estate, if not by an earlier transfer."

The Federal statute, (Sec. 66, Title 12, U. S. C.), (Appendix p. 31) and the decisions construing the same, clearly create a liability upon the estate of a deceased shareholder for the payment of the assessment, specifically excepting therefrom the fiduciaries, as such, but subjecting the property belonging to the estate in their hands to the payment thereof. See also *Matteson* v. *Dent*, 176 U. S. 521, 524; *Richmond* v. *Irons*, 121 U. S. 27, 55, 56; *Zimmerman* v. *Carpenter*, 84 Fed. 747, 751; *Drain* v. *Stough*, 61 Fed. (2d) 668, 669.

B.

The Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes 1935; Sec. 70, Ill. Adm. Act), providing that claims of any class not exhibited to the court within one year from the granting of Letters of Administration shall be forever barred from sharing in the distribution of the inventoried assets, does not relieve the estate and the undistributed inventoried assets in the hands of the executors from the obligation and liability for stock assessment imposed by the Federal law. (Sec. 66, Title 12, U. S. C.)

The court below held that the validity of the claim would not be affected in any way by the laws of Illinois, but also held that as to the method of its enforcement the claim was governed by the practice prescribed by state law, and disallowed the claim as to the inventoried assets of the estate (R. 23) by reason of the provisions of the Illinois Non-Claim Statute, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes 1935; Sec. 70, Ill. Adm. Act), (Appendix p. 31) which bars from participation in the distribution of the inventoried assets all claims against estates that are not filed within one year, and based this conclusion upon its construction of the recently decided case of *Forrest* v *Jack, supra.* (R. 23) It is respectfully submitted that the holding in that case decides only that where the estate has been completely extinguished under the laws of that state, the liability subsequently arising under Sections 64 and 66, Title 12, U. S. C., cannot be enforced. There the Receiver was attempting to reach property of the estate of a deceased shareholder. The law of Utah, where the case arose, provided in effect that distribution fully extinguished the estate and that subsequent claims arising against it were thereafter barred. In this connection the court said at page 163:

> "In the absence of federal enactments relating to procedure for enforcement of the liability imposed by Sec. 66, collection is to be made in accordance with state laws governing claims against estates of deceased

persons, at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority. There is no suggestion that the laws of the State of Utah discriminate against or are inadequate for the just and convenient enforcement of liability imposed, Sec. 66, against estates of deceased stockholders. *There can be no liability on account of assessments made after complete administration, final distribution of all the property and the extinguishment of the estate.*" (Italics inserted)

In the case at bar, the estate of Elvira J. Parks, deceased, is still open and is in process of administration, (R. 10) with undistributed inventoried assets of the estate *in the hands of the executors*, the appraised value of which is far in excess of the assessment claim of the Receiver. (R. 26) Consequently the facts are clearly distinguishable from those in *Forrest* v. *Jack, supra*, and the Federal statute, Sec. 66, Title 12, U. S. C., (Appendix p. 31) by its specific and unqualified provision directly *imposes the liability on the undistributed assets in the hands of the executors.*

The case of *Zimmerman* v. *Carpenter*, 84 Fed. 747, (cited with approval by this court in *Forrest* v. *Jack, supra*, and *Seabury* v. *Green, supra*), is on all fours with the case at bar. There, the time within which a claim could be presented in accordance with state law against the estate of a deceased shareholder, expired in December, 1895. The bank failed in November, 1896, the assessment was levied in February, 1897, and became due one month later. It was contended that the claim was barred by the statute of South Dakota fixing the time within which claims could be presented. The court said at page 750:

"Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an *ordinary claim* against the estate of Charles C. Carpenter, deceased, to be presented and allowed in the manner required by the laws of the State of South Dakota, and, if not so presented and allowed, to be forever barred by the statute of nonclaim of said state, involves a

total misconception of the object, meaning, and effect of sections 5151, 5152, Rev. St. U. S." (Sections 64 and 66, Title 12, U. S. C.) (Parenthesis and italics inserted)

and further at page 751:

"But Congress intended to, and did, provide that the estate of the testator or intestate, in the hands of an executor or administrator, should be liable in like manner, and to the same extent, as the testator or intestate would be if living, and competent to act, and hold the stock. By the language of the section last referred to, the death of the testator or intestate does not in any way affect the liability of the estate of the testator or intestate, *except, if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged.* On the 23d day of November, 1896, when the Dakota National Bank failed, Frances G. Carpenter, as the executrix of the estate of Charles C. Carpenter, deceased, under the laws of the United States and of South Dakota, was a shareholder therein. To the extent of 100 per cent. of the par value of the stock held by her, the estate of Charles C. Carpenter in her hands on that day was liable; not as if Carpenter was dead, but in the same manner, and to the same extent, as if he was living; the clear object of the statute being to make the estate liable for a debt arising after the death of a testator or intestate, as well as those arising before. On the 23d day of November, 1896, so much of the estate of Charles C. Carpenter, deceased, which was in the possession of defendant, as executrix of said Carpenter, on that day, stood not as the estate of a deceased person with reference to the liability on said stock, but in the place of Charles C. Carpenter himself, liable in like manner and to the same extent as he (Carpenter) would have been if alive." (Italics inserted)

The recent case of *Drain* v. *Stough* (C. C. A. 9) 61 F. (2d) 668, (also cited by this court with approval in *Forrest* v. *Jack, supra*), is in point. There it appeared that the decedent stockholder died June 7, 1930, his will being admitted to probate and the executor duly qualified. On June 18,

1930 the notice to creditors was first published. Under the law of the State of Washington, claims were required to be presented to the executor within six months after the first publication of notice to creditors by the executor. The assessment was not levied by the Comptroller of the Currency until January 19, 1931, the bank being closed on November 20, 1930. The lower court held that the claim sued upon was barred by reason of the state law, requiring claims against the decedent to be filed within six months after the first publication of the notice to creditors. The Circuit Court of Appeals reversed the holding of the lower court and said at page 669:

> "We are then to consider the question as to whether the fact that the national bank went into the hands of a receiver after the death of the stockholder created such a claim as must be presented to the executor under the Washington statute (section 1477, et seq., Remington's Compiled Statutes). It will be observed that the notice published by the executor is directed to 'all persons having claims against the deceased to serve the same on the executor or administrator or his attorney of record * * * within six months after the date of the first publication of such notice,' and that, 'if a claim be not filed within the time aforesaid, it shall be barred. * * *' (Italics ours.) Is this a claim 'against the deceased'? At the time of his death the bank was solvent, the stock passed to his executors upon his death and their qualification, with the ultimate ownership in the heirs. The liability of the estate to creditors is fixed by the statute specially applicable, section 5152 R.S. (12 U.S.C.A. Sec. 66), as follows: 'Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.'
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> "That is to say, the estate is charged with an equitable lien for the assessments properly apportioned to

the stock, and neither the decedent nor the owner of the stock, whether executor, administrator, legatee, or distributee, is personally liable for said assessment, as is the case with other transferees or owners, but the estate left by the decedent is liable. Zimmerman v. Carpenter (C. C.) 84 F. 747. The obligation to the bank's creditors, although arising out of an implied contract of the decedent stockholder, is a statutory obligation. McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437; McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. *It is well settled that a statute, requiring the presentation of claims against a decedent, does not apply to claims against his estate arising in the course of administration,* that is, to claims against the funds in the hands of the executor or administrator. It was so held under a similar statute of California requiring the presentation of claims to an executor. Miller & Lux v. Katz, 10 Cal. App. 576, 102 P. 946. There the corporate stock was owned by the deceased. After his death the corporate debt was created. It was held that the estate was liable for its proportion of the debt, fixed by statute upon a stockholder, and that the claim therefor need not be presented to the executor. See, also, Plummer v. Light, 139 Wash. 670, 247 P. 1022. The Supreme Court of the state of Montana, with laws similar to Washington and California with reference to the presentation of claims against a decedent, in the case of Springhorn v. Dirks, 72 Mont. 121, 231 P. 912, 915, held, under a state statute identical with section 5152, R.S. (12 U.S.C.A. Sec. 66, supra), it was not necessary to present a claim to the executor of the will of a deceased stockholder in a state bank as a basis for a recovery of the assessment made for the benefit of creditors of the bank, following Zimmerman v. Carpenter (C.C.) 84 F. 747, supra, and Rankin v. Miller (D. C.) 207 F. 602.

"We conclude that the law of the state of Washington did not require the presentation of a claim for either a contingent or accrued liability on stock in a national bank, *where the insolvency of the bank occurred after the death of the stockholder.*" (Italics inserted)

At pages 33-43 of the Appendix will be found the Findings of Fact, Conclusions of Law, Amended Findings of Fact and Conclusions of Law, and Decree of the Honorable Walter C. Lindley, Judge of the District Court of the United States for the Eastern District of Illinois, in the case of *William M. Below, Receiver of The First National Bank of Ridgefarm, Illinois* v. *First National Bank of Danville, Illinois, Administrator with the Will Annexed of the last Will and Testament of Pleasant Mills, deceased.* (Decision July 31, 1936; not yet reported.)

From the Findings of Fact it appears that Pleasant Mills was the record owner of seven shares of the capital stock of the First National Bank of Ridgefarm at the time of his death, which occurred on April 4, 1932, and defendant was thereafter appointed administrator. The bank was subsequently declared insolvent by the Comptroller of the Currency, who appointed the Receiver on October 10, 1933 and levied a stock assessment on January 4, 1934, payable on or before February 13, 1934. Thereafter, the Receiver, on February 2, 1934, filed his claim in the Probate Court for the assessment in the sum of $700.00, which was not allowed on the ground that it was not exhibited to the Probate Court within one year of the issuance of Letters Testamentary as provided by the Illinois Statute, (Section 70 of the Ill: Administration Act; Ch. 3, Par. 71, Section 70, Ill. Revised Statutes, 1935). (Appendix p. 31) Suit was then brought at a time when the estate was still in process of administration and there were in the hands of the administrator substantial assets of the estate which had not been distributed.

The court held that the Receiver's claim should be paid out of the proceeds of the *undistributed assets*, in equal proportion to the sum received by all general creditors whose claims against the estate had been allowed by the Probate Court, and said (Appendix p. 33):

> "The estate has not been completely administered. The proceedings in the probate court are still pending

> and substantial assets remain in the hands of the administrator. The stock was issued to the deceased some years before his death and never transferred. In the absence of proof of such transfer, the estate remains liable. Consequently, the case is governed by Seabury v. Green, 294 U. S. 165 and Forrest v. Jack, 294 U. S. 158, and plaintiff is entitled to the relief prayed.
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> "Nor does the denial of the claim in the probate court, because of the elapse of a year before filing same, bar this action. As said by the Supreme Court in Seabury v. Green, supra, the enforcement of liability imposed by the federal statutes may not be thwarted or impeded by the state law. See also Zimmerman v. Carpenter, 84 Fed. 747 (CCAB); Mortimer v. Potter, 213 Ill. 178 and authorities cited in 41 A.L.R. 181."

See also the Memorandum Opinion of the same court in the case of *J. B. Drake, Receiver of the First National Bank of Monticello, Illinois* v. *Annie Dilatush, Executrix of the Estate of Frank V. Dilatush, Deceased,* (Decision May 11, 1936; not yet reported) which will be found in the Appendix at pages 44-55.

Attention may be directed by way of cumulative authority to the following assessment cases: *Matteson* v. *Dent,* 176 U. S. 521, 524; *Parker* v. *Robinson,* (C. C. A. 1), 71 Fed. 256, 257; *Rankin* v. *Miller,* 207 Fed. 602, 612; *Luce* v. *Thompson,* (C. C. A. 8), 36 Fed. (2d) 183, 184, 185; *Gilbertson* v. *McCarthy,* (C. C. A. 8), 32 Fed. (2d) 665, 667, 668; *Davis* v. *Weed,* 7 Fed. Cas. 186, 190, 191.

The position of the petitioner and the distinctions to be drawn between the effect of accrual of the assessment claim before and after expiration of the period for filing claims are clearly exemplified by the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Mann* v. *Kleisdorf,* 16 Fed. (2d) 997. There it appeared that an assessment was levied by the Comptroller of the Currency during the lifetime of the stockholder, but suit was not instituted thereon until one year after her death, the execu-

trix being named as defendant. The defendant executrix relied upon a statute in Mississippi which provided that all claims not probated and registered within six months should be barred. *It appeared that the Receiver could have filed his claim within the specified time, inasmuch as the assessment had been levied prior thereto,* but the six months' period for filing claims had expired before the institution of the suit. The court said at pages 997, 998:

> "The liability sought to be enforced dates from the assessment made by the Comptroller of the Currency. Rankin v. Barton, 199 U. S. 228, 26 S. Ct. 29, 50 L. Ed. 163. Under R. S. Sec. 721 (Comp. St. Sec. 1538), there being no federal statute, the law of Mississippi is to be regarded as the rule of decision in this case, and the liability of a stockholder of a national bank, or his executor, is subject to the state statute of limitations. Campbell v. Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. Ed. 280; McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437. It has been held by the Supreme Court of Mississippi that the nonclaim statute in question is a statute of limitations. Miller v. Trustees of Jefferson College, 5 Smedes & M. (Miss.) 651; Cohea v. Commissioners, 7 Smedes & M. (Miss.) 437.
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> "We are in accord with that view. To the end that estates may be promptly settled, it is the common, if not the universal, policy of the several states to bar by legislation claims against the estates of the dead within a less period of time than is required for the assertion of claims against persons who are living. The provision in R. S. Sec. 5152, to the effect that funds in the hands of the legal representative of a deceased person shall be liable in like manner and to the same extent as the deceased person interested would be, if living, does not have the effect of depriving a state of the power to make a difference in the time within which claims will be barred if not presented, on the one hand, to an executor, or, on the other, to the person interested if he be living. That section has no reference to the time of presentation of a claim, but

only makes the funds in the hands of the legal representative as fully liable as the deceased would be if living. *Doubtless the receiver would not be barred within the six months set up as a bar by the statute of Mississippi, if the assessment had not been made by the Comptroller until after the period covered by the bar of the statute had run. In that event, the receiver would have been entitled to pursue his remedy against the funds of the decedent into whosoever hands they might have come.* (Italics inserted)

"Zimmerman v. Carpenter (C. C.) 84 F. 747, and Springhorn v. Dirks, 72 Mont. 121, 231 P. 912, relied on by plaintiff, do not support a different conclusion. In the first of these cases no claim was asserted against the estate until after the period of limitation had run, whereas in this case the assessment antedated both the death of the stockholder and the appointment of her executrix, and was therefore an existing claim against the estate at the time notice, pursuant to the nonclaim statute was given. In the other case it does not appear whether the assessment was made during the lifetime of the decedent, as was the fact in this case."

Applying the principles laid down in the foregoing cases to the instant case, it appears that the contingent assessment liability of Elvira J. Parks upon the twelve shares of stock survived her death and became a liability of, and an equitable lien upon, her estate, and inasmuch as the estate is still in process of administration and there are in the hands of executors undistributed inventoried assets valued far in excess of the petitioners' claim, (R. 10, 26) the effect of the decision and judgment of the Appellate Court of the First District of the State of Illinois barring the petitioner's claim from participating in the distribution of the inventoried assets, has operated to thwart, impede and possibly completely nullify the enforcement of a liability created by the Federal statute, (Title 12, U. S. C., Sec. 66), (Appendix p. 31). Said decision is in conflict with the principles established by this Honorable Court in *Forrest* v. *Jack, supra; Seabury* v. *Green, supra.* Compare *Cook*

County National Bank v. *United States*, 107 U. S. 445, 448; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283, 284; *Easton* v. *Iowa*, 188 U. S. 220, 229; *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216, 226; *Lewis* v. *Fidelity & Deposit Company of Maryland*, 292 U. S. 559, 566 (to the effect that state law can not impede, thwart, or nullify Federal statutes).

The general doctrine laid down in the foregoing cases clearly establishes the proposition that the national banking laws are a system complete within itself, covering the organization, supervision and liquidation of national banks, and that the laws of the states will not be permitted to discriminate against or interfere with the operative effect of the Federal provisions enacted in accordance with the unqualified intent of the Congress.

The force and effect of the Federal statute, (Title 12 U. S. C. Sec. 66) in this respect has been recognized by the Supreme Court of Illinois in the leading case of *Mortimer et al.* v. *Potter*, 213 Ill. 178; 72 N. E. 817, where it appeared that Charles Kavanagh, the stockholder of a national bank, died, and the assets of his estate had been delivered to trustees under a trust created under the will, and the decedent's estate had been settled more than twenty years before the assessment was levied. The stock apparently remained of record in the name of decedent and checks for dividends were made payable to Charles Kavanagh and were endorsed by the widow as co-trustee under the trust. The receiver sued the surviving trustee, as trustee, (the widow having died), the distributees receiving the assets of the estate, and also the surviving trustee personally. The court affirmed the judgment of the lower court, rendering judgment to take effect primarily against the surviving trustee, secondarily against the legatees and distributees, and ultimately against the trustee personally, for the assets of the estate to the extent necessary to meet the assessment. The defense raised the point, *inter alia*, that the claim was barred because not presented within two years as required by state law. In overruling this contention and holding

that the state statute was ineffective against the Federal statutes, the court said (p. 818 Reporter citation):

> "It is next insisted by appellants that, even though this claim is valid against the estate, yet it cannot be enforced because it is barred by the statute of limitations, not having been presented for probate against the estate of Kavanagh within two years after the granting of testamentary letters. *The claim against his estate is not by virtue of the laws of this state, but under the provisions of the foregoing federal statute. In addition to this, at the time the administration of his estate was closed the claim had not accrued. The liability arose more than 20 years after the expiration of the 2 years within which claims could have been filed against it in the probate court. But the remedy under the act of Congress is applicable, and the estate is liable under its provisions, so long as the assets can be reached.*
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> "The case of Zimmerman v. Carpenter (C. C.), 84 Fed. 750, involved this same question. It was there claimed that a plea of the statute of limitations, based upon the statute of the state of South Dakota regulating the time in which claims should be presented for allowance or rejection against the estate, barred the claim there presented. In considering the question the court said: 'Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of the deceased, to be represented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever barred by the statute, involves a total misconception of the object, meaning, and effect of sections 5151 and 5152 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3465). Congress provided by these sections that the estate of the testator in the hands of an executor should be liable in like manner and to the same extent as the testator would be if living and competent to act and hold the stock. By the language of section 5152 the death of the testatory does not in any way affect the liability of the estate, except, if no liability on the stock arises until after the estate is fully distributed, then

there would be no estate to be charged.' Under the facts in this case the liability attached while the assets were in the hands of the trustee, and therefore came directly under the provisions of section 5152, supra." (Italics inserted.)

This case was recently cited with approval by the Supreme Court of Illinois in *Kingston* v. *Old National Bank of Centralia* (1934), 359 Ill. 192; 194 N. E. 213, 219.

Thus it is clear that the Supreme Court of Illinois has recognized the paramount effect of the Federal statute (Sec. 66, Title 12, U. S. C.—Appendix p. 31) and that where the assessment liability does not accrue or become absolute until the time prescribed for filing claims against the estates of deceased shareholders has expired according to the provisions of the state non-claim statutes, the enforcement of the assessment liability is not barred by the failure to file the claim within the period required by the non-claim statute.

Further, in support of the general principle (regardless of whether the claim is based upon a federal statute) that where the liability is not only contingent, but is also, from its very nature, incapable of being presented and allowed in the pending probate proceedings, due to the fact that the liability may never culminate into absolute liability, such contingent and uncertain claims can not reasonably be considered to be within the scope and purpose of non-claim statutes and therefore are not necessarily barred from enforcement by failure to file within the period required by the non-claim statute, see:

Hantzch v. *Massolt*, 63 N. W. 1069-1072, 62 Minn. 361;
Miller & Lux v. *Katz*, 102 Pac. 946, 947;
Springhorn v. *Dirks*, 231 Pac. 912, 915;
Zimmerman v. *Carpenter*, 84 Fed. 747, 750-751;
Allen, Commissioner of Banks v. *Hanover Trust Co.*, 142 N. E. 105, 106, 107;
Tierney v. *Shakespeare*, 284 Pac. 1019, 1020;
Baird v. *McMillan*, 205 N. W. 682, 683, 684, 41 A. L. R. 177;
Johnson v. *Libby*, 88 Atl. 647, 650, 651.

C.

The enforcement of the liability imposed by Section 66, Title 12, U. S. C., may not be thwarted or impeded by state law which discriminates against or is inadequate for the just and convenient collection of the amount of the assessment. To require the petitioner to collect his claim in accordance with the laws of Illinois governing claims against estates of deceased persons, would compel him to proceed in a manner inadequate for the just and convenient enforcement of a liability specifically imposed by the Federal Statute, (Sec. 66, Title 12, U. S. C.), thus discriminating against and impeding the collection of a liability imposed by the national authority.

The decisions of the Supreme Court of Illinois are to the effect that the Non-Claim Statute, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes, 1935; Sec. 70, Ill. Adm. Act), (Appendix, p. 31) is not a general statute of limitations, but is a specific act adopted for the particular purpose of facilitating the early settlement of estates, and when a contingent claim against a deceased person does not ripen into an absolute liability until the expiration of the period allowed by law for presenting claims against an estate, the creditor is not permitted to participate in the distribution of the estate previously inventoried or accounted for by the executor or administrator. He must satisfy his debt out of property subsequently discovered or inventoried.

Such a claimant may, however, maintain a bill in equity against the heirs, devisees or legatees to reach the property of the estate received by them.

See *Union Trust Co.* v. *Shoemaker*, 258 Ill. 564; 101 N. E. 1050; *Chicago Title & Trust Co.* v. *Corp. of Fine Arts Bldg.*, 288 Ill. 142; 123 N. E. 300; *Pearson et al.* v. *McBean et al.*, 231 Ill. 536; 83 N. E. 173; *Ryan* v. *Jones*, 15 Ill. 1; *Stone* v. *Clarke*, 40 Ill. 411; *Rassieur* v. *Jenkins*, 170 Ill. 503; 48 N. E. 976; *Morse* v. *Pacific Ry. Co.*, 191 Ill. 356; 61 N. E. 104; *Beebe* v. *Kirkpatrick*, 321 Ill. 612; 152 N. E. 539; *Durflinger*

v. *Arnold*, 329 Ill. 93; 160 N. E. 172; *Foreman State Trust & Sav. Bk.* v. *Tauber*, 348 Ill. 280; 180 N. E. 827.

Thus it appears that even though the executors or administrators have in their hands undistributed inventoried assets of the estate, *a contingent claim arising under state law* which does not become absolute within the period prescribed for filing claims against estates of deceased persons is barred from participation in the distribution of the inventoried assets, even though there may remain in the hands of the executors or administrators, undistributed inventoried assets of value sufficient to pay such a claim. The claimant in such cases, in the absence of the existence of subsequent inventoried assets of the estate, must remain passive and inactive until a distribution is ordered and made to all creditors proving claims and to the heirs and distributees or legatees, or so much thereof as would be sufficient to satisfy his claim, and then bring a bill in equity against the heirs and legatees or distributees for the purpose of subjecting the property of the estate received by them in payment thereof.

The question of the applicability of Section 70, Ch. 3 of the Revised Statutes of Illinois, (Appendix p. 31), in connection with a claim such as the claim of the petitioner in this case was directly before the District Court of the United States for the Eastern District of Illinois in the case of *J. R. Drake, Receiver of the First National Bank of Monticello, Illinois*, v. *Annie Dilatush, Executrix of the Estate of Frank V. Dilatush, Deceased supra*, the opinion of District Judge Walter C. Lindley being printed in full in the Appendix at pages 44-45. There it was contended on behalf of the estate that, inasmuch as the plaintiff's claim for stock assessment did not arise until after the period for filing claims had expired under Section 70, Ch. 3 of the Revised Statutes of Illinois, (Appendix p. 31), the Receiver could not share in the undistributed inventoried assets of the estate for the purpose of satisfying his claim, and the decision of this court in *Forrest* v. *Jack, supra*, was

relied upon as authority for that position. In discussing the effect of the Non-Claim Statute of Illinois upon a claim for stock assessment arising under the Federal law, the court said (Appendix pp. 51-52):

> "Defendant earnestly insists that the plaintiff's cause of action is barred by Section 70 Chapter 3 of the Revised Statutes of the State of Illinois which bars claims after one year from the date of the probate of the will, except as to subsequently inventoried property and relies upon the case of *Forrest* v. *Jack, et al*, 294 U. S. 158, recently decided by the Supreme Court. Decided the same day was *Seabury* v. *Green*, 294 U. S. 165. *Upon careful analysis, these cases do not support defendant's contention.* The holding in the case of *Forrest* v. *Jack, supra*, was to the effect that the estate is not liable for an assessment made after final distribution of the deceased's property and after the cessation of existence of such estate. The court held that the liability for the assessment continues unimpaired until valid assignment of the shares is made by final distribution or by other transfer and that the liability 'cannot be thwarted or impeded by state law.' In the latter case the court said:
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> > 'For the want of capacity the minors are not subject to the assessment. The shares, though in form transferred to their names on the books of the bank, actually continued to be and still are a part of the testator's estate. *Early* v. *Richardson*, 280 U. S. 496, 499. Cf. *McNair* v. *Darragh*, 31 F. (2d) 906. And the estate continued to be liable as a stockholder under Section 66. The liability was not by the Congress intended to be limited to property actually in the hands of the personal representative when the bank became insolvent or when the comptroller's assessment was made. Section 64 imposes liability upon the stockholder while living. Section 66 lays the same burden upon his estate. The purpose of the latter is to make the estate liable for the comptroller's assessment made after the stockholder's death just as it is liable for decedent's indebtedness arising before he died. . . . As suggested in *Forrest* v. *Jack, supra*, the enforcement of liability imposed by

Section 66 may not be thwarted or impeded by state law.'

"This is in accord with the public policy of Illinois, for in *Mortimer et al* v. *Potter, Receiver,* 213 Ill. 189, even though the liability of a national bank stockholder did not arise until long after the stockholder's death and long after the expiration of the time for filing claims in probate, during all of which period, however, the estate had been administered by a trustee for the benefit of the widow, it was held that the assets of the estate, were impressed with the liability. *The statute fixing the time for filing claims against the estate is not a general law of limitation but* a specific act for facilitating early settlements of estates. *Union Trust Co.* v. *Shumaker,* 258 Ill. 568. The court held there that where a claim against a deceased person has remained contingent during the whole period allowed by law for presenting claims against the estate and does not ripen into absolute liability until the estate has been distributed, the claimant may maintain a bill in equity against such legatees to reach the property of the estate received by them. This decision goes much further than it is necessary to go in the present case. In *Sanders* v. *Merchants State Bank,* 349 Ill. 547 the claim was not exhibited within the year. It was contingent and had not ripened into maturity, and the court held that the suit was properly brought to reach the funds of the estate *and that the remedy provided by the federal statute to recover an assessment may be enforced as long as the assets can be reached regardless of the expiration of the statutory period for filing claims. Mortimer* v. *Potter,* 213 Ill. 178; *First Natl. Bank of Hinckley* v. *Clark,* 275 Ill. App. 282; *Dairyman's State Bank* v. *Durham,* 271 Ill. App. 249. The statute of Illinois forbids devises in fraud of creditors. (Cahill's Ill. Statutes, Chap. 59, Secs. 10, 11, 12), and equity affords relief against such action. *Durflinger* v. *Arnold,* 329 Ill. 93 and cases there cited." (Italics inserted)

This decision clearly points out the distinction existing where the estate has been finally closed and extinguished under state law, as was the case in *Forrest* v. *Jack, supra,* where this court said at page 163:

> "There can be no liability on account of assessments made after complete administration, final distribution of all the property and the extinguishment of the estate."

As previously indicated (*supra*, pp. 10-11) the facts in the instant case are clearly distinguishable from *Forrest* v. *Jack*, *supra*, as it appears from the stipulation of fact, (R. 9, 10, 11 and 26), that the estate is not closed and there are undistributed inventoried assets in the hands of the executors of sufficient value to satisfy petitioner's claims. In *Matteson* v. *Dent*, *supra*, where there had been a complete distribution, and in *Seabury* v. *Green*, *supra*, where there was an attempted complete distribution, it was pointed out by this court that under the law of the states where the cases arose complete distribution did not *extinguish the estate* and contingent claims arising thereafter could be satisfied from the distributed assets to the extent they had been received by the heirs.

As long as the assets remain in the hands of the executors awaiting distribution, the situation is tantamount to the decedent herself owning them as a living person and consequently liable for the assessment. Therefore, in view of the foregoing, it is respectfully submitted that the provisions of the Illinois law, limiting and restricting the enforcement of contingent claims that become absolute after the time prescribed for filing claims against an estate has expired, are inconsistent with, inadequate for, and discriminatory against, the just and convenient enforcement of the assessment liability imposed by the national authority.

From the standpoint of enforcing the assessment liability imposed by the Federal Statute, it is obvious that the problem created by the expiration of the period for filing claims under the non-claim statute is not adequately or reasonably solved by the fact that under the State law in such case the receiver may possibly be able to satisfy the assessment

claim out of property subsequently discovered and inventoried or, in the alternative, may proceed against the heirs, devisees, legatees, or distributees receiving the inventoried property from the estate, for the reasons that:

(a) The situation may be, as in the instant case, that no additional assets exist, and therefore can not be inventoried as a source of future payment of the assessment claim, in which event the previously inventoried but undistributed assets already on hand would be free from the assessment claim, notwithstanding the purpose of the Federal Statute is to substitute the undistributed assets of the estate on hand in place of the deceased stockholder.

(b) To require the receiver to stand inactive, awaiting the pleasure or whim of the executor or administrator of the estate with reference to the distribution of the *untouchable* inventoried assets, and to thus defer enforcement of the assessment liability until after the assets have been distributed to the beneficiaries under the estate would obviously defeat the purpose of the Federal Statute which was designed to render relief to the depositors and creditors of the bank as quickly as possibly by a speedy winding up of its affairs including the enforcement of assessment liability. It is entirely possible that the delay, or the failure, of the executor or administrator of the estate of the decedent to make distribution among the beneficiaries and thus enable the receiver to proceed against said beneficiaries, would prolong the liquidation of the estate beyond the normal period of receivership liquidation and in any event would unnecessarily increase the expense of liquidation by deferring and continuing, for the elapsed period of delay, the liquidation of the receivership. It is manifestly unreasonable, and defeatist in effect, to permit the State law to compel the receiver to fall back upon the remedy of recourse against the distributees of the estate, waiting in the meantime for such distribution to be made, when the undistributed assets are already on hand, stand in place of the decedent, and are capable of being subjected immediately to the enforcement of the assessment. A State statute

would thus be given paramount effect over the Federal Statute.

As far back as its decision in *Kennedy* v. *Gibson*, 8 Wall. 498, this Honorable Court has recognized and established that the plain purpose of the National Bank Act was that the affairs of an insolvent national bank in the hands of a Receiver appointed by the Comptroller of the Currency should be expeditiously and speedily wound up. At page 505 of that opinion, it was said:

> "A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it and it was the obvious policy and purpose of Congress to give it."

To the same effect is the recent expression of this court in the case of *Korbly* v. *Springfield Institution for Savings*, 245 U. S. 330, where at page 333 it was said:

> "From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction, and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. Studebaker v. Perry, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463; Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; United States v. Knox, 102 U. S. 422, 26 L. ed. 216; Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; and Bowden v. Johnson (Adams v. Johnson), 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246."

CONCLUSION.

We believe, in view of the foregoing, that the judgment of the court below should be reversed, and the Receiver's claim allowed against the undistributed inventoried assets of the estate in the hands of the executors.

Respectfully submitted,

OTIS F. GLEN,
GEORGE P. BARSE,
J. H. BREWER, JR.,
Attorneys for Petitioner.

R. G. REAL,
HAROLD E. BAILY,
Of Counsel.

APPENDIX.

Jurisdiction of Appellate and Supreme Courts.

Chapter 110, Sec. 75 (2), Illinois State Bar Statutes, 1935, (Cahill's R. S. of Ill. 1935 Ed., p. 2448):

"Appeals shall be taken * * * in all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions:

"(1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal.

"(2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: *Provided, however,* * * * in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). * * *."

Statutes Involved.

Section 64, Title 12, U. S. C. A., provides in part as follows:

"The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value

thereof, in addition to the amount invested in such stock * * *."

Section 66, Title 12, U. S. C. A., provides:

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be, if living and competent to act and hold the stock in his own name."

Section 70 of the Illinois Administration Act (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), provides in part as follows:

"All demands against the estate of any testator or intestate shall be divided into classes in manner following, to wit:

"First. Funeral expenses and necessary costs of administration.

* * * *

"Sixth. All other debts and demands of whatever kind without regard to quality or dignity, which shall be exhibited to the court *within one year from granting of letters as aforesaid.* (Italics inserted.)

"All claims and demands of whatever class *not* exhibited to the court *within one year from the granting of letters as aforesaid shall be forever barred as to property and estate of the deceased which has been inventoried or accounted* for by the executor or administrator: and if the executor or administrator shall thereafter file any inventory listing other estate not previously inventoried or accounted for, and shall cause notice to be published in the manner provided by Section 60 of this act, or give such other notice as the court may direct, of a day fixed upon, which shall not be less than three months after the date of such first publication, for the filing and exhibiting of further claims against said decedent, all claims not exhibited to the court prior to the date so fixed shall be forever barred as to the property and estate listed in such inventory,

and the amount remaining due on all claims exhibited to the court on or prior to the day so fixed upon as aforesaid, including those filed within one year from the granting of letters shall be paid pro rata out of such subsequently inventoried estate, saving, however, to infants, persons of unsound mind and persons in the employment of the United States or of this State and residing outside of the United States, the term of one year after their respective disabilities are removed to exhibit their claims. (As amended by Act approved June 30, 1933.)". (Italics inserted.)

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOT THE EASTERN DISTRICT OF ILLINOIS.

WILLIAM M. BELOW, Receiver of The First National Bank of Ridgefarm, Ridgefarm, Illinois,	
v.	In Equity No. 811-D.
FIRST NATIONAL BANK OF DANVILLE, ILLINOIS, Administrator With the Will Annexed of the Last will and Testament of Pleasant Mills, Deceased.	

FINDINGS AND CONCLUSIONS.

This is a suit in equity by the receiver of a national bank to impress the assets of the estate of a deceased stockholder with liability for an assessment upon such stock. The estate has not been completely administered. The proceedings in the probate court are still pending and substantial assets remain in the hands of the administrator. The stock was issued to the deceased some years before his death and never transferred. In the absence of proof of such transfer, the estate remains liable. Consequently, the case is governed by Seabury v. Green, 294 U. S. 165 and Forrest v. Jack, 294 U. S. 158, and plaintiff is entitled to the relief prayed.

Nor does the denial of the claim in the probate court, because of the elapse of a year before filing same, bar this action. As said by the Supreme Court in Seabury v. Green, *supra*, the enforcement of liability imposed by the federal statutes may not be thwarted or impeded by the state law.

See also Zimmerman v. Carpenter, 84 Fed. 747 (CCAB); Mortimer v. Potter, 213 Ill. 178, and authorities cited in 41 A.L.R. 181.

Consequently, there will be a decree impressing the assets of the estate with liability for the demand.

I do not agree, however, that this debt should have preference over other claims against the estate. The federal statute does not purport to give any priority to National bank stock assessments over other creditors. The decree should be framed, therefore, so that other general creditors and plaintiff shall share upon the same basis in proportion to their respective demands in the assets of the estate considered as a whole. Proper decree may be sumbitted.

The foregoing is herewith adopted as my findings of fact and conclusions of law, pursuant to Equity Rule 70½.

Entered this 15th day of July, A. D. 1936.

(Signed) WALTER C. LINDLEY,
Judge.

At a stated term of the District Court of the United States in and for the Eastern District of Illinois, held in the Court Room thereof in the Federal Building in the City of Danville, and State of Illinois this 8th day of July, A. D. 1936.

Present:

HONORABLE WALTER C. LINDLEY,
District Judge.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOT THE EASTERN DISTRICT OF ILLINOIS.

WILLIAM M. BELOW, Receiver of The First National Bank of Ridgefarm, Ridgefarm, Illinois, *Plaintiff*, v. FIRST NATIONAL BANK OF DANVILLE, ILLINOIS, Administrator With the Will Annexed of the Last Will and Testament of Pleasant Mills, Deceased, *Defendant*.	In Equity No. 811-D.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The court having heretofore entered its findings of fact and conclusions of law and the defendant having filed objections thereto,

NOW, THEREFORE, upon due consideration the court enters its amended findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

I.

That Pleasant Mills late of the County of Vermilion and State of Illinois was during his lifetime the owner of seven (7) shares of the capital stock of First National Bank of Ridgefarm, Ridgefarm, Illinois evidenced by stock certificate number 32 issued by said Bank.

II.

That the said Pleasant Mills died testate on the 4th day of April, A. D. 1932 owning seven (7) shares of the capital stock of First National Bank of Ridgefarm, Ridgefarm, Illinois, and that First National Bank of Danville, Illinois is now the duly appointed, qualified and acting administrator with the will annexed of the last will and testament of Pleasant Mills, deceased.

III.

That William M. Below was appointed Receiver of said First National Bank of Ridgefarm, Ridgefarm, Illinois, by the order of the Comptroller of the Currency of the United States of America pursuant to the statutes of the United States in such cases made and provided on the 10th day of October, A. D. 1933 and that he thereafter qualified as such receiver and has continued since that date to act and is now acting as the duly qualified and constituted receiver of First National Bank of Ridgefarm, Ridgefarm, Illinois.

IV.

That the Comptroller of the Currency of the United States of America pursuant to the statutes of the United States of America in such case made and provided, levied and made an assessment and requisition upon the shareholders of First National Bank of Ridgefarm, Ridgefarm, Illinois, for $50,000.00 or $100 per share on the capital stock of said Bank to be paid by said shareholders on or before the 13th day of February, A. D. 1934 with interest thereon at the legal rate of the State of Illinois from that date forward to the date of payment of said liability, on the 4th day of January, A. D. 1934.

V.

That demand was made upon the personal representative of Pleasant Mills, deceased, for the payment of the sum of

Seven Hundred Dollars, ($700.) together with interest on said sum from and after the 13th day of February A. D. 1934 at the legal rate of the State of Illinois to the date of payment of said sum pursuant to the assessment levied and made by the Comptroller of the Currency of the United States of America above mentioned, being the assessment upon the seven (7) shares of the capital stock of First National Bank of Ridgefarm, Ridgefarm, Illinois owned by the said Pleasant Mills, deceased, at the time of his death.

VI.

That prior to the time of the filing of the complaint in this case and on October 6, 1933, pursuant to an order of the Probate Court of Vermilion County, Illinois, distribution was made to creditors of the estate represented by defendant, whose claims were allowed by said Probate Court on said date as follows:

To F. A. Cannady, payment on claim	$1,222.80
To Nellie Moffett, payment on claim	2.31
To First National Bank, Westville, Illinois, payment on claim	51.75
To Nellie Baum, payment on claim	711.09
To First National Bank of Ridgefarm, Ridgefarm, Illinois payment on claim	22.23
To First National Bank of Ridgefarm, Ridgefarm, Illinois payment on claim	984.33
To Third class claims in full	17.00

VII.

That prior to the time of filing the complaint in this case and on February 2, 1934, the plaintiff filed his claim of Seven Hundred Dollars ($700.) based on the assessment by the Comptroller of the Currency of the United States of America made on seven (7) shares of the capital stock of the First National Bank of Ridgefarm, Ridgefarm, Illinois, held and owned by Pleasant Mills, deceased, at the time of his death in the matter of the estate of Pleasant Mills, de-

ceased; that objection was made to said claim so filed by the plaintiff herein by the defendant herein as administrator on the ground that said claim was not exhibited to the Probate Court of Vermilion County, Illinois, within one year next following the issuance of letters testamentary as provided by the statute of the State of Illinois relative to administration upon estates and that the plaintiff's claim was dismissed by the said Probate Court of Vermilion County, Illinois, on April 16, 1934, on the ground urged by defendant herein and that the plaintiff herein prayed an appeal from said order of dismissal to the Circuit Court of Vermilion County, Illinois, and that afterward the plaintiff herein presented a motion to the Probate Court of Vermilion County, Illinois, praying that the judgment of said Court dismissing plaintiff's claim above herein referred to be vacated, which said motion to vacate was denied by the Probate Court of Vermilion County, Illinois, on June 29, 1934, and that the plaintiff herein prayed an appeal from the judgment of said Probate Court denying said motion to vacate to the Circuit Court of Vermilion County, Illinois, and that the plaintiff herein failed to perfect either of the appeals hereinbefore referred to as being prayed to him.

VIII.

That at the time of the filing of the complaint in this case, the defendant as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, had in its possession the sum of Three Thousand Five Hundred Fifty-four Dollars and fifty-nine cents ($3,554.59).

IX.

That at the time of the hearing on this case, the estate of Pleasant Mills, deceased, was not completely administered and that the proceedings for the administration of the same are still pending in the Probate Court of Vermilion County, Illinois, and that substantial assets of said

estate remain in the hands of the administrator, defendant herein.

X.

That the defendant as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, has refused to pay the assessment levied by the Comptroller of the Currency of the United States upon the seven (7) shares of the capital stock of First National Bank of Ridgefarm, Ridgefarm, Illinois, owned by Pleasant Mills, deceased at the time of his death or the interest upon the same according to the assessment or any part thereof.

CONCLUSIONS OF LAW.

Whereupon the Court concluded as a matter of law:

I.

That the assets of the estate of Pleasant Mills, deceased, now in the hands of the defendant, First National Bank of Danville, Illinois, administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, are subject to a lien in favor of the plaintiff, William M. Below, as receiver of the First National Bank of Ridgefarm, Ridgefarm, Illinois, by reason of the assessment made and levied by the Comptroller of the Currency of the United States of America upon the capital stock and shareholders of said First National Bank of Ridgefarm, Ridgefarm, Illinois, in the amount of Seven Hundred Dollars ($700.) together with interest at the legal rate of the State of Illinois on said sum of Seven Hundred Dollars ($700.) from the 13th day of February A. D. 1934 forward to the date of payment of said assessment by reason of the fact that the said Pleasant Mills, deceased, died the owner of seven (7) shares of the capital stock of said First National Bank of Ridgefarm, Ridgefarm, Illinois.

II.

That the lien heretofore herein impressed upon the assets of the estate of Pleasant Mills, deceased, in the hands of the defendant First National Bank of Danville, Illinois, as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, in favor of the plaintiff, William M. Below, as receiver of the First National Bank of Ridgefarm, Ridgefarm, Illinois, may be discharged only by payment by the defendant, First National Bank of Danville, Illinois, administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, to William M. Below as receiver of the First National Bank of Ridgefarm, Ridgefarm, Illinois, of a sum out of the assets of the estate of Pleasant Mills, deceased, which sum shall be in equal proportion to the sum received by all sixth class or general creditors having claims against the estate of Pleasant Mills, deceased, allowed against said estate by the Probate Court of Vermilion County, pursuant to the statutes of the State of Illinois in such case made and provided considering the full value of all claims including the lien herein decreed in favor of the plaintiff at the date upon which final distribution to and payment of said sixth class or general claims and lien herein decreed is made by the defendant from the funds in its hands as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased,

Let a decree be entered accordingly.

(Signed) WALTER C. LINDLEY,
United States District Judge.

Dated July 31, 1936.

At a stated term of the District Court of the United States in and for the Eastern District of Illinois held in the Court Room thereof in the Federal Building in the City of Danville, and State of Illinois this 8th day of July A. D. 1936.

Present:

HONORABLE WALTER C. LINDLEY,
District Judge.

WILLIAM M. BELOW, Receiver of The First National Bank of Ridgefarm, Ridgefarm, Illinois, *Plaintiff*,

v.

FIRST NATIONAL BANK OF DANVILLE, ILLINOIS, Administrator With the Will Annexed of the Last will and Testament of Pleasant Mills, Deceased, *Defendant*.

In Equity No. 811-D.

DECREE.

The above entitled cause came on regularly for trial in the above entitled court, Honorable Walter C. Lindley, judge of said Court, presiding, on the 8th day of July A. D. 1936, the plaintiff, William M. Below, receiver of the First National Bank of Ridgefarm, Ridgefarm, Illinois, being represented by his attorney, Riley McLain, and the defendant, First National Bank of Danville, Illinois, Administrator with the Will annexed of the Last Will and Testament of Pleasant Mills, deceased, appearing and being represented by its attorneys, Alfred A. Johnson and John Clark of the firm of Hutton & Clark, whereupon evidence both oral and documentary on behalf of the parties was offered and received and the Court having duly considered the evidence and arguments of counsel and being fully advised in the premises entered a decree on July 23, 1936, and now enters this decree which is in accord with the decree heretofore entered herein on July 23, 1936, but is entered because of the modification of findings of fact and conclusions of law entered simultaneous herewith.

IT IS NOW THEREFORE ORDERED, adjudged and decreed that the assets of the estate of Pleasant Mills, de-

ceased, remaining in the hands of the defendant be and the same are hereby impressed with a lien in favor of plaintiff in the amount of Seven Hundred Dollars ($700.00) and interest thereon at the legal rate of the State of Illinois on said sum of Seven Hundred Dollars ($700.) from the 13th day of February, 1934, forward to the date of payment of said sum.

It is further ordered, adjudged and decreed that the lien hereby impressed shall be discharged by the payment by defendant to plaintiff of a sum out of the assets of the estate of Pleasant Mills, deceased, which sum shall be in equal proportion to the sum received by all sixth class or general creditors having claims against the estate of Pleasant Mills, deceased, allowed against said estate by the Probate Court of Vermilion County, Illinois, considering the full value of said claims including the lien hereby impressed, at the date upon which final distribution to and payment of said sixth class or general claims and the lien hereby impressed is made by the defendant from the funds in its hands as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased.

ENTER:

(Signed) WALTER C. LINDLEY,
District Judge.

Dated July 31, 1936.

DISTRICT COURT OF THE UNITED STATES OF AMERICA

EASTERN DISTRICT OF ILLINOIS

I, D. H. REED, Clerk of the District Court of the United States for the Eastern District of Illinois, and keeper of the records and seals thereof, do hereby certify the foregoing to be a true copy of the original Findings and Conclusions filed and entered July 15th 1936; Amended Findings of Fact and Conclusions of Law filed and entered on July 31st 1936; and Decree entered on July 31st, 1936 in the matter of WILLIAM M. BELOW, RECEIVER OF THE FIRST NATIONAL BANK OF RIDGEFARM, RIDGEFARM, ILLINOIS vs. FIRST NATIONAL BANK OF DANVILLE, ILLINOIS, ADMINISTRATOR WITH THE WILL ANNEXED OF THE LAST WILL AND TESTAMENT OF PLEASANT MILLS, DECEASED, IN EQUITY NO. 811-D, as fully as the same appears from the original Findings; Amended Findings and Decree now on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Danville, in the District aforesaid, this 1st day of September A. D. 1936.

D. H. REED,
Clerk.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF ILLINOIS.

J. R. DRAKE, Receiver of the First National Bank of Monticello, Illinois, Plaintiff,

v.

ANNIE DILATUSH, Executrix of the Estate of Frank V. Dilatush, Deceased, *Defendant.*

In Equity No. 730-D.

LINDLEY, *District Judge:*

Plaintiff brought this suit in equity against Annie Dilatush, and Annie Dilatush, as Executrix of the Estate of Frank V. Dilatush, Deceased. The Court later dismissed the motion as to Annie Dilatush. The cause is at issue upon an amended and supplemental bill of complaint and answer thereto by defendant as executrix.

J. R. Drake is the duly designated, qualified and acting Receiver of The First National Bank of Monticello, by appointment of the Comptroller of the Currency, on January 12, 1934. He succeeded himself as conservator, to which latter office he had been appointed on March 31, 1933.

Frank V. Dilatush, a stockholder and director of the bank, died testate April 27, 1932, owning 45 shares of the capital stock of the bank of the par value of $4,500.00. He left surviving as his sole heir at law, his daughter Annie Dilatush. His will was admitted to probate and letters testamentary were issued on May 3, 1932, to Annie Dilatush, as executrix under his last will and testament. She is still acting as such; the estate has not been closed, but is being ad-

ministered in the County Court of Piatt County, Illinois, which has probate jurisdiction. The appraisement of the testator's property showed personal property on the farms of approximately $10,000.00 in value. Defendant inventoried the real estate consisting of three tracts, 304.82 acres of land in Champaign County, 240 acres in Piatt County and 45.26 acres in Piatt County. The last two tracts are free of incumbrances. The first is incumbered by a mortgage securing $20,000.00, held by The Equitable Life Assurance Society. Under the will, the shares in the bank and all other property passed to the defendant as executrix.

In the administration of the estate, the defendant fixed July 5, 1932, as the date upon which claims could be filed against the estate, as provided by the statute of the state of Illinois, and the time for filing claims in court, under the statute of Illinois, expired one year from the granting of the letters of executorship, long prior to any assessment by the comptroller. The conservator, while in charge, performed some banking functions. Claims have been filed and allowed against the estate, aggregating approximately $18,000.00 and there is pending a disputed claim for $12,063.00.

On the 2nd day of April, 1934, the Comptroller of the Currency of the United States made an assesment upon all shares, of 100 per cent of the par value thereof, including the shares held by defendant as executrix, and on April 9, 1934, written demand was made upon defendant for the payment of such assessment. The bank was closed March 4, 1933, under proclamation of the governor of Illinois. It never reopened, but remained closed under such proclamation, and has been in process of liquidation since the appointment of the receiver.

Defendant contends that there is no proper description of plaintiff in the bill of complaint. The proper name is J. R. Drake, Receiver of The First National Bank of Monticello, Illinois. Plaintiff omitted the word "Illinois," but by its motion now presented seeks leave to amend by adding the word "Illinois" to plaintiff's title. This amendment the

court allows in furtherance of justice. No harm results to defendant.

Defendant insists that plaintiff's remedy is at law; that such legal remedy is adequate and that equity has no jurisdiction. The assessment was made in pursuance of the statutes of the United States governing national banking associations. Title 12, U. S. Code, Sec. 64, provides that "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof, in addition to the amount invested in such stock * * *." Section 66 provides that "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name." The suit is grounded upon section 66, and seeks, therefore, no personal liability against defendant for this, the statute expressly denies. Rather plaintiff seeks to establish a liability against "the estate and funds in the hands" of the executrix, so that such property, held in her fiduciary capacity, shall be subjected to the assessment to the same extent as the testator himself would have been liable if living. In other words, the plaintiff seeks to establish a liability of which he cannot obtain recognition in the probate court and to subject property in the hands of a fiduciary of a deceased testator to a statutory liability. It would seem obvious that such remedy lies only in a court of equity. Courts of equity have always opened their doors to prayers for relief, which seek, not to establish liabilities at law, for tort, in assumpsit or otherwise, but seek to reach property beyond the reach of a court of law and isolated in the hands of a trustee, receiver, guardian or other fiduciary. The enforcement of trusts as a matter of equity and jurisdiction

is taken of suits against executors and administrators, as upon a trust to be executed. Kendall v. Creighton, 23 How. 90, 16 L. ed. 419; Corker v. Jones, 110 U. S. 317. Even if there were a remedy at law provided by state statute, that fact, the Supreme Court has said, will not deprive the federal court of jurisdiction to enforce a lien by bill in equity, the establishment of the lien being essentially an equitable proceeding. Sheffield Furnace Co. v. Witherow, 149 U. S. 574; De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co., 46 Fed. 829, reversed on other grounds, 57 Fed. 111.

Probate estates were originally solely within the jurisdiction of courts of equity and transfer thereof to probate courts is a matter of statute. Thus Pomeroy's Equity Jurisprudence, Vol. 1, 4th Ed., p. 191, says:

> "The relation subsisting between executors and administrators on the one hand, and legatees, distributees, and creditors on the other, has so many of the features and incidents of an express active trust, that it has been completely embraced within the equitable jurisdiction in England, and also in the United States, where statutes have not interfered to take away or to abridge the jurisdiction."

I conclude, therefore, that plaintiff's cause of action, being one not to establish a personal liability but to have established a liability against property in the hands of the fiduciaries, cannot adequately be given fruition in a suit at law but is clearly within equity jurisdiction.

Defendant's answer sets up that heretofore in a suit in the state court plaintiff by way of cross-bill sought to enforce the same liability here asserted. This fact is relied upon as ground for abatement. But the record is that such prayer for relief was voluntarily withdrawn by plaintiff. There was, therefore, no adjudication and nothing to furnish ground for abatement.

Defendant contends that the liability upon the assessment is not a contractual one but a penalty; that the bank

conservation act, having been adopted subsequent to the attaching of ownership of testator's shares, is, in effect, retroactive and *ex post facto* in character, and, therefore, invalid; that under the terms, subsequent to March 3, 1933, the management of the bank was taken from the stockholder, the directors and officers and put in the hands of a conservator under order and instructions from the Comptroller and operated by him in the restricted manner possible under the act. It is insisted that the Comptroller's only legal power was to declare the bank insolvent, appoint a receiver and liquidate the institution. It is said that by ousting the bank's management, the Comptroller and conservator have estopped themselves to assert the liability of the stockholder.

True it is that where the performance of contract lawful in its execution is made unlawful by any subsequent event, the contract is dissolved, and that impossibility of performance created by acts of law operates as a discharge. But, admitting for the moment, only for the purpose of disposal of this question, that the conservation act and its operation were illegal or unconstitutional, that fact does not relieve the stockholder of its statutory liability. The reasoning of the cases relied upon by defendant is not applicable to the present situation.

In the case of Barbour, *et al.* v. Thomas, 7 F. Supp. 271, it appeared that the First National Bank of Detroit was closed as a result of the governor's proclamation and it was said that stockholders should not be liable for shrinkage of assets because of the allegedly illegal holidays or the acts of the conservator. The court held, however, that the statutory liability of stockholders is immediately available for creditors when there are valid debts made by the bank and the Comptroller is satisfied that it is necessary to make the levy to satisfy the debts, saying:

> "It would be a novel proposition if a bank stockholder could defeat the creditors by showing the assets were dissipated through the acts of the officers ap-

pointed to administer them. Such a principle would make it necessary for the courts to review every act of such officers and make the cost of collecting the assessment greater than any amount that could be collected. The statute makes no provision for the relief of bank stockholders on account of dissipation of assets * * * Therefore it is immaterial whether the bank was solvent on the dates of the state and national holidays and at the time of the appointment of a conservator, nor is it material whether the sale of a part of the assets by the conservator, which was approved by a court of competent jurisdiction, resulted in the insolvency of the bank. The sale did not create the debts and consequently could not release the liability of the bank stockholders. The allegations in these respects and the proof tendered in support thereof were immaterial to the main issues, did not, and could not, constitute a defense at law or in equity. Day v. United States, 245 U. S. 159, 38 S. Ct. 57, 62 L. Ed. 219."

The Court said further:

"This court deems it unnecessary to inquire into the legality of the holidays. Northern Pacific R. Co. v. American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. Ed. 269. However, the bank officials closed the bank. If the holidays were illegal, then they were not legally compelled to obey."

So here, if the proclamation of the governor was illegal, the bank officers and directors were in no way bound by the same and might have ignored it. Likewise, if the appointment of the conservator and his acts were, as defendant contends, illegal and unconstitutional because of ex post facto character and beyond the powers of the Congress, the time to attack such appointment was when it was made. The officers, directors and stockholders had a right to bring a direct attack upon the actions now complained of; they had a right to resist the validity of the appointment of the conservator and any action by him by proper suit in equity to restrain him. But the directors, officers and stock-

holders may not stand by and fail to assert their complaint against allegedly invalid laws and later when the time comes for assertion of liability, seek to attack collaterally the very things they permitted to proceed without protest.

Defendant alleges that the will of the testator in order to assure faithful execution of the contract to pay his sister a certain income, provided for the establishment of a trust fund to secure the payment of the annuity, and that such trust fund includes the bank stock complained of; that, therefore, the executrix does not hold the stock and the funds in her hands are not liable for the same. However, it appears that the title of the trustee has not vested; that the trustees have never been put in possession of any trust fund; that the administration in the probate court is still pending; that there are unpaid debts. Under the laws of Illinois, the claims of creditors are superior to those of legatees or devisees. Consequently, the title of the trustees is subject to the equities of the creditors and the estate remains with the executrix until the debts have been paid. Creditors have recourse to such funds and it is that recourse plaintiff is seeking to enforce. Defendant relies upon Jones v. Cronkleton, 67 F. (2d) 17 and Jones v. Cronkleton, 67 F. (2d) 21. But in those cases the administration of the estate had been closed and in pursuance of the provisions of the trust, the certificates of stock had been surrendered and new ones issued to the trustee. Obviously, thereafter, the liability for the assessment would attach against the trust estate and not to that of the deceased party. The facts clearly distinguish the case from the present one. Here there has been no transfer of the certificates upon the bank's books; there has been no assignment by the executrix; there has been no transfer of title and the estate of the deceased remains unliquidated in the hands of the executrix.

It might have been better practice for the plaintiff to have made as additional parties defendant the trustees under the will, but though they are proper parties they are

not indispensable, for the estate at the present time is under the absolute control of the executrix, and the trustees' interest therein has not passed to them. The title to all assets is, as we have seen, subject to the claims of creditors.

Defendant earnestly insists that the plaintiff's cause of action is barred by Section 70 Chapter 3 of the Revised Statutes of the State of Illinois which bars claims after one year from the date of the probate of the will, except as to subsequently inventoried property and relies upon the case of Forrest v. Jack, *et al.*, 294 U. S. 158, recently decided by the Supreme Court. Decided the same day was Seabury v. Green, 294 U. S. 165. Upon careful analysis, these cases do not support defendant's contention. The holding in the case of Forrest v. Jack, supra, was to the effect that the estate is not liable for an assessment made after final distribution of the deceased's property and after the cessation of existence of such estate. The court held that the liability for the assessment continues unimpaired until valid assignment of the shares is made by final distribution or by other transfer and that the liability "cannot be thwarted or impeded by state law." In the latter case the court said:

> "For the want of capacity the minors are not subject to the assessment. The shares, though in form transferred to their names on the books of the bank, actually continued to be and still are a part of the testator's estate. Early v. Richardson, 280 U. S. 496, 499. Of. McNair v. Darragh, 31 F. (2d) 906. And the estate continued to be liable as a stockholder under Section 66. The liability was not by the Congress intended to be limited to property actually in the hands of the personal representative when the bank became insolvent or when the comptroller's assessment was made. Section 64 imposes liability upon the stockholder while living. Section 66 lays the same burden upon his estate. The purpose of the latter is to make the estate liable for the comptroller's assessment made after the stockholder's death just as it is liable for decedent's indebtedness arising before he died. * * * As suggested in Forrest v Jack, supra, the enforcement of liability im-

posed by Section 66 may not be thwarted or impeded by state law."

This is in accord with the public policy of Illinois, for in Mortimer et al v. Potter, Receiver, 213 Ill. 189, even though the liability of a national bank stockholder did not arise until long after the stockholder's death and long after the expiration of the time for filing claims in probate, during all of which period, however, the estate had been administered by a trustee for the benefit of the widow, it was held that the assets of the estate were impressed with the liability. The statute fixing the time for filing claims against the estate is not a general law of limitation but a specific act for facilitating early settlements of estates. Union Trust Co. v. Shumaker, 258 Ill. 568. The court held there that where a claim against a deceased person has remained contingent during the whole period allowed by law for presenting claims against the estate and does not ripen into absolute liability until the estate has been distributed, the claimant may maintain a bill in equity against such legatees to reach the property of the estate received by them. This decision goes much further than it is necessary to go in the present case. In Sanders v. Merchants State Bank, 349 Ill. 547 the claim was not exhibited within the year. It was contingent and had not ripened into maturity, and the court held that the suit was properly brought to reach the funds of the estate and that the remedy provided by the federal statute to recover an assessment may be enforced as long as the assets can be reached regardless of the expiration of the statutory period for filing claims. Mortimer v. Potter, 213 Ill. 178; First Natl. Bank of Hinckley v. Clark, 275 Ill. App. 282; Dairyman's State Bank v. Durham, 271 Ill. App. 249. The statute of Illinois forbids devisees in fraud of creditors. (Cahill's Ill. Statutes, Chap. 59, Secs. 10, 11, 12), and equity affords relief against such action. Durflinger v. Arnold, 329 Ill. 93 and cases there cited.

Defendant contends that the assessment is invalid for the reason that it does not purport to have been made under Section 66. The assessment was made April 2, 1934, and recited that "in order to pay the debts it is necessary to enforce the individual liability of the stockholders as described by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1C156, Act of June 30, 1876, and Sections 23, Act approved December 23, 1913, known as the Federal Reserve Act." The order further recites that by virtue of the authority vested in him by law, the comptroller thereby made an assessment upon the share holders of the First National Bank of Monticello for $150,000.00 and demand upon each and every one of them for the par value of each and every share of the capital stock of the association held by them respectively at the end of its failure. Act Section 1C156 of June 30, 1876 is also Title 1a (U. S. C. A. Section 191).

Under the law, the Comptroller, when satisfied of the insolvency of an association, may, after due examination, appoint a receiver, who shall proceed to close up the association and to enforce the personal liabilities of the shareholders, Title 12, U. S. C. A., Section 191. The law further provides that the stockholders of each national bank shall be held individually responsible for all contracts and debts of the association each to the full amount of his stock. See Title 12, U. S. C. A., Section 63. We have noticed the liability prescribed by statute in Sections 63 and 66 of Title 12.

It was said in Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. Ed. 475, 478: "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it."

Judge Sanborn in Deweese v. Smith, 106 F. 438, 445 (C. C. A. 8), affirmed 187 U. S. 638, in a case where the defens

was based on an allegation that the assessment was to make good losses sustained by the receiver and for which the shareholders were not liable, said:

> "But this question is not open to litigation in this case. Under the acts of Congress and the decisions of the courts to which reference has been made the Comptroller of the Currency constitutes a *quasi* judicial tribunal, to whose exclusive determination Congress has intrusted the decisions. * * * His decisions of questions within his jurisdiction are, like the decisions of the land department and of other *quasi* judicial tribunals, impervious to collateral attack, and open to avoidance by the court only in a direct attack upon them on the grounds of clear error of law, fraud, or mistake."

This suit is properly instituted by the receiver. It is one necessary to close up the affairs of a national bank, jurisdiction of which Congress has expressly put in the federal courts. The comptroller levied the assessment which stands absolute and effective against any collateral attack. Congress has made the funds of the estate liable for the assessment. The executrix is in possession of the estate. The administration of the estate has not been closed; the statute is directly applicable. Any objection to the legality of the executive proclamation or the comptroller's orders comes too late and should have been asserted in a direct attack. Consequently, the defenses fail.

Plaintiff is entitled to a decree fixing the liability of the estate of Frank V. Dilatush for an assessment for the par value of the shares of stock, plus interest thereon according to law and impressing all the assets in the hands of the executrix with a lien to secure such liability. The said liability shall be of the same priority as other claims of the sixth class under the statute of Illinois and said lien shall be enforcible to protect the liability upon such basis. It will be the intent of the decree that said lien shall protect the interests of the plaintiff so that plaintiff will share

equally with other creditors of the sixth class of the estate. Decree is entered simultaneously herewith.

The foregoing is adopted by me as my findings of fact and conclusions of law in conformity with Equity Rule 70½ of the Supreme Court.

Entered this 11th day of May, A. D. 1936.

(Signed) WALTER C. LINDLEY,
Judge.

CERTIFIED COPY.

United States of America, Eastern District of Illinois, ss:

I, D. H. REED, Clerk of the United States District Court in and for the Eastern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Opinion filed and entered on the 11th day of May, A. D. 1936, in the matter of J. R. DRAKE, RECEIVER OF THE FIRST NATIONAL BANK OF MONTICELLO, ILLINOIS vs. ANNIE DILATUSH, EXECUTRIX OF THE ESTATE OF FRANK V. DILATUSH, DECEASED, IN EQUITY NO. 730-D, as fully as the same appears from the original OPINION now on file and of record in this court and in my keeping. Now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Danville, Illinois, this 30th day of September, A. D. 1936.

D. H. REED,
Clerk.

(Seal)

By VERNA PECK,
Deputy Clerk.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 18

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, A CORPORATION,
Petitioner,

v.

ESTATE OF ELVIRA J. PARKS, DECEASED,
Respondent.

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PETITIONER.

OTIS F. GLENN,
GEORGE P. BARSE,
J. H. BREWER, JR.,
Attorneys for Petitioner.

R. G. REAL,
HAROLD E. BAILY,
Of Counsel.

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ESTATE OF ELVIRA J. PARKS, DECEASED,

Respondent.

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PETITIONER.

By leave of court first had and obtained:

Petitioner submits herewith a memorandum of cases (with brief explanatory comment where necessary), bearing primarily on the point raised in the argument concerning the relief which might have been afforded petitioner by a bill in equity filed in the State court, and the effect or consequence of petitioner not following that course.

A.

Under Illinois law the Probate Court has equitable jurisdiction and powers in the settlement and allowance of

claims against the estates of decedents and can render, in such cases, the same relief which might be rendered in a bill in equity to establish such claims.

(1) Statutory Provision Covering Jurdisdiction of Probate Courts in Illinois.

"Probate Courts shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlement of their accounts * * *." (Section 303, Ch. 37, Smith-Hurd Revised Statutes of Illinois, 1935)—NOTE: The foregoing statutory provision is almost identical in language with the constitutional provision (Constitution of 1870, Article 6, Section 20, Smith-Hurd Revised Statutes, 1935).

(2) Court Decisions Concerning the Equity Powers of Probate Courts.

Edward F. Trego, Trustee, Plaintiff in Error, v. *Estate of James A. Cunningham, Deceased,* 267 Ill. 367, 373, 374.

(Pp. 373-374) "The claimant alleged the insolvency of the principal maker and of the sureties * * * and asked for contribution of one-third of the amounts of the notes * * *. That was an appeal to the equitable powers of the probate court, and that court, although without general chancery jurisdiction, has equitable jurisdiction in the settlement and allowance of claims. To avoid the delay, expense and embarrassment in the settlement of estates by requiring a resort, in the first place, to a court of equity, it will proceed in a case of an equitable character as though a bill in chancery has been filed, and will hear the evidence, investigate the claim, and apply equitable rules in determining the judgment * * *. In such a case the court will act substantially as a court of equity, disregarding mere matters of form and looking to the substance to determine the equities of the parties. * * *

(374) This suit was, in substance, a proceeding in chancery which might have been prosecuted in a court of chancery, where there would be no trial by a jury, and the probate court, when called upon to grant the same relief upon the same equitable principles, would properly adopt the same procedure."

(Above case cited on same point of jurisdiction and procedure in *Sebree* v. *Sebree*, 293 Ill. 228, 235, 236)

Matthews v. *Kerfoot*, 167 Ill. 313, 319, 320.

(P. 319) "The real question in this case is, what were the rights of the parties under the contract set out in the foregoing statement? The claimant's contention is, *that by the terms of the contract there was vested in him an interest in the land* described in the contract and in the proceeds arising therefrom after the sale of the land * * *. The contention of the executors of the estate of George L. Matthews, defendants in the probate court of Cook County, where the claim was filed, first, and appellants here, is, that Kerfoot had abandoned the contract before the sale.

(P. 320) "It was held in Doggett v. Dill, 108 Ill. 560, that the probate court, in the matter of claims against estates, exercises a jurisdiction equitable in its nature, and if the estate is liable under the contract, judgment could be entered against the estate. (Hurd v. Slaten, 43 Ill. 348; Mason v. Tiffany, 45 Id. 392). The question whether the contract gave Samuel H. Kerfoot an equitable interest in the land and an interest in the proceeds arising from the sale thereof must be determined from the construction of the contract, and whether it was the intention of Matthews and Cornwell, the parties thereto, that Kerfoot should acquire an equitable interest in the land."

Foreman State Trust & Sav. Bank v. *Tauber*, 348 Ill. 280, 284, 285; 180 N. E. 827, 829.

(P. 829, Reporter citation) "It is first contended by plaintiff in error that the probate court had no

jurisdiction to allow the claim of defendant in error because * * * (2) the action, if any, was one that should have been brought in a court of equity; and (3) the claim was contingent. * * *

(P. 829) "If it were true that the claim is one which is enforceable on equitable principles only, and not by an action at law, it does not follow that the probate court was without jurisdiction to pass upon the claim and either allow or deny it, because the probate courts of this state, in the adjustment and allowance of claims against the estates of deceased persons, are invested with equitable jurisdiction. Henry v. Caruthers, 196 Ill. 136, 63 N. E. 629; Estate of Ramsay v. Whitbeck, 183 Ill. 550, 56 N. E. 322. It is true that, where a claim is such that it remains contingent during the whole of the period fixed by statute (Smith-Hurd Rev. Stat. 1931, c. 3, Sec. 71) for presenting claims against the estate of a deceased person, it cannot be allowed against the estate. Beebe v. Kirkpatrick, 321 Ill. 612, 152 N. E. 539, 47 A. L. R. 891; Chicago Title & Trust Co. v. Fine Arts Building, 288 Ill. 142, 123 N. E. 300; Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 N. E. 1050. The claim presented by defendant in error against the estate of Max Tauber was not, however, a contingent claim."

Also see:

In re Corrington's Estate, 124 Ill. 363, 366
Pollock, Adm. v. *Cantlin*, 253 Ill. App. 229, 234
In re Estate of Kinsey, 261 Ill. App. 481, 487.

(3) Application of Foregoing Decisions to the Instant Case in View of the Procedure Shown by the Transcript of Record.

(a) The record indicates that the procedure followed, the points raised, and the relief asked, by petitioner in the Probate Court, and in the Appellate Courts, constituted in sub-

stance and legal effect, proceedings in equity and entitled petitioner to equitable relief, in that the opinion of the Appellate Court establishes that:

(1) Petitioner contended his claim arose under Section 5152 R. S. and was binding upon the executors (and the assets in their hands) and was "not such an ordinary claim as would be barred by Chapter 3, par. 71, Section 70, Illinois Revised Statutes, 1935" (R. 21).

(2) Petitioner contended that the non-claim statute "was not designed to bar a claim arising by virtue of the Federal statute which was not absolute and which did not accrue until after the one year period for filing claims had expired" (R. 21).

(3) Petitioner contended that the Federal assessment statute "creates a special class of claim which is charged as a lien upon the estate of the deceased stockholder, and which is not governed by the laws of Illinois relative to the administration of estates of decedents" (R. 23).

(b) The Probate Court, and the Appellate Courts on review, sitting as courts of equity under the issues raised, should have accorded petitioner the relief prayed.

Illinois Merchants Trust Company v. *Turner*, 341 Ill. 101, 105.

> "The law is well settled in this state that when adjudicating upon that class of questions over which it has general jurisdiction, the Probate Court is entitled to as liberal intendments in favor of its jurisdiction as are extended to the courts of general jurisdiction."

Seabury v. *Green*, 294 U. S. 165.

> (P. 168) "Section 64 imposes liability upon the stockholder while living. Section 66 lays the same burden upon his estate. The purpose of the latter is to

make the estate liable for the comptroller's assessment made after the stockholder's death just as it is liable for decedent's indebtedness arising before he died."

. . . . . .

(P. 169) "As suggested in Forrest v. Jack, supra, the enforcement of liability imposed by Section 66 may not be thwarted or impeded by state law. The state court failed to enforce that liability. It should have held that petitioner is entitled to judgment against the administratrix for the indebtedness owing by the estate on account of the four shares standing in the names of the minors and that the judgment be enforced against property owned by testator when he died and now held by his children and grandchildren."

(c) No different or greater relief could have been obtained by petitioner had he filed suit in the State Equity Court than could have been rendered in the proceedings in the instant case had the Probate Court (and the Appellate Courts on review) exercised the equity jurisdiction clearly vested in them and embraced within the issues raised by petitioner.

B.

Position indicated by the equity courts of Illinois with reference to application of the non-claim statute to contingent claims accruing after the expiration of the time for filing claims, and where inventoried assets are still on hand.

One of the questions suggested by the court at the argument, as we recall it, was whether there were any decisions of the equity courts of Illinois with reference to the application or bar of the Non-Claim Statute where assets were still in the hands of the executor or administrator, and where the claim was contingent and accrued after the expiration of the time for filing claims.

In the short time elapsing between the conclusion of the argument and the filing of this memorandum, many Illinois cases have been examined, but we have been unable to find any case in the equity court, as such, where the foregoing issue was raised and decided. Numerous cases arising in the Probate Court, in the equity courts, and apparently, in other instances, on the law side of the courts, have passed on the general question of the effect and application of the Non-Claim Statute, and they seem clearly to establish the doctrines for which the cases at the bottom of page 22 of petitioner's brief have been cited; that is to say, that where the claim is not filed within the required period, recovery can be had only from assets subsequently discovered and inventoried, or from heirs, devisees, or legatees, after distribution has been made. Statements are contained in some of the equity cases which definitely indicate that a contingent claim arising after expiration of the time limit cannot be collected or enforced even as against assets on hand, but it must be frankly conceded that such statements are required to be treated as dicta, owing to the fact that the precise issue in this connection was not before the court, either due to the fact that distribution had been made, or for other reasons. For example, the statements contained in the opinion of the court in the case of *Union Trust Co.* v. *Shoemaker*, 258 Ill. 564, 570, quoted on pages 7 and 8 of respondent's brief, although considered to be in point by petitioner from the standpoint of a mere statement of principle, must be rejected if considered other than as dicta. Perhaps the same comment should be made with reference to the case of *Mortimer et al.* v. *Potter*, 213 Ill. 178, discussed and quoted on pages 19-21 of petitioner's brief, in view of the fact that although the assets were still available in the hands of the trustees under the will, nevertheless, so far as the probate proceedings were concerned, distribution had been made by delivery of the assets of the estate of

Charles Kavanagh in the probate proceedings, to the trustees under the will.

The case of *Sanders* v. *Merchants' State Bank,* 349 Ill. 547; 182 N. E. 897, 904, contains the following language, which not only reiterates the general rule, but also indicates that no distinction in applying the statute is to be drawn between the law and equity courts.

> (Page 904, Reporter citation.) "A claim not exhibited within the time fixed is not absolutely barred, but its right to participate in the distribution of the assets of the estate actually inventoried or accounted for is lost. *Waughop* v. *Bartlett,* 165 Ill. 124, 46 N. E. 197; *Gross* v. *Estate of Thornson,* 286 Ill. 185, 121 N. E. 600; *Durflinger* v. *Arnold,* 329 Ill. 93, 160 N. E. 172. The rule is applied in equity as well as at law, and, while a mortgagor may foreclose his mortgage in equity after two years without presenting to the administrator or the court the note or other obligation secured by it, he cannot have a deficiency decree for participation in the assets of the estate which have been inventoried or accounted for."

Also see, in this connection:

Morse v. *Pacific Ry. Co.,* 191 Ill. 356; 61 N. E. 104, 106;
Levy v. *Kuss, Administratrix, et al.,* 219 Ill. App. 194.

C.

Concurrent jurisdiction in State and Federal courts to prosecute actions arising under Federal statutes and obligation of the State courts to render relief.

(1) The State and Federal courts have concurrent jurisdiction in the enforcement and collection of assessment liability on national bank stock. *McCormick* v. *Smith,* 130 Pac. 999, 1001, 23 Idaho 487; *Jones* v. *Jenkins,* 22 F. (2d) 642, 644. (Many decisions have been rendered in State

courts enforcing assessment liability on national bank stock, without the question of concurrent jurisdiction being specifically raised, e.g., *Matteson* v. *Dent,* 176 U. S. 521; *Seabury* v. *Green,* 294 U. S. 165, etc.)

(2) Where the Federal law creates a cause of action and does not limit the prosecution of such actions in the Federal courts, the general rule is that the State courts have concurrent jurisdiction. *Robb* v. *Connolly,* 111 U. S. 624, 637; *State of Missouri* v. *Taylor,* 266 U. S. 200, 208.

(3) Petitioner should not be affected in his right to recover, by the fact that suit was filed in the State court rather than in the Federal court. The State Probate court, in the instant case, had full jurisdiction and under the ruling in *Seabury* v. *Green, supra,* the State court should have rendered the relief prayed.

Respectfully submitted,

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(8295-C)

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 864

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, A CORPORATION,
Petitioner,

vs.

ESTATE OF ELVIRA J. PARKS, DECEASED,
Respondent.

ANSWER OF ESTATE OF ELVIRA J. PARK, DECEASED, TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS.

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IN THE

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No.

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, A CORPORATION,
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Respondent.

ANSWER OF ESTATE OF ELVIRA J. PARK, DECEASED, TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS.

STATEMENT OF CASE.

The statement of the case contained in the petition for the writ of certiorari is substantially correct.

The questions presented in the petition for the issuance of the writ of certiorari (Petitioner's Petition page 6, paragraph 5) are the only questions involved in this litigation.

Reasons for denial of writ and summary of argument.

1. No showing is made by the petitioner that the Statutes of the State of Illinois relative to the filing of claims against estate of decedents, in any way discriminate against claims of the type of the claims in the instant case.

2. No showing is made by the petitioner that the claim in question was entitled to be exempted from limitations applicable to claims of a similar nature but not created by a Federal Statute.

Forrest v. *Jack,* 294 U. S. 158-165;
Seabury v. *Green,* 294 U. S. 165-169.

ARGUMENT.

The decisive question in this case is whether the laws of Illinois relative to the filing of claims in the Probate Court against the estate of decedents and the practice of the Probate Court as determined by such statutes are inconsistent with the Federal Statute in question or discriminate against claims arising under said statute.

It seems to be the contention of petitioner that the claim was of a special character which entitled it to be exempted from certain limitations which would have been applicable to it, if it had been an ordinary claim arising for instance upon a promissory note. It is admitted that the claim could not be discriminated against but upon the other hand, was it entitled to preferred treatment?

This general subject matter has been recently treated by the court in the cases of *Forrest* v. *Jack*, 294 U. S. 158-165 and *Seabury* v. *Green*, 294 U. S. 165-169.

In those cases the laws and practice of three states were discussed. These laws differed very radically from one another but the following principal was laid down:

> "In the absence of federal enactments relating to procedure for enforcement of the liability imposed by Section 66, collection is to be made in accordance with state laws governing claims against estates of deceased persons, at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority."

CONCLUSION.

In conclusion respondent submits that the instant claim was given the same consideration which it would have received had it arisen in any other way than under a Federal Statute and that it was not entitled to be treated as preferred or unique.

Wherefore, it is respectfully prayed that said petition for writ of certiorari be denied.

Respectfully submitted,

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OCT 7 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 18

M. J. PUFAHL, Receiver of the Austin National Bank of Chicago, Illinois, a Corporation,

Petitioner,

vs.

ESTATE OF ELVIRA J. PARKS, Deceased,

Respondent.

Brief for Respondent.

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(B) The law of Illinois is adequate for the enforcement of the instant claim, and does not discriminate against it.

(C) The instant claim is a "debt" or "demand" within the meaning of Section 70 of the Illinois Statute of Non-Claim.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 18

M. J. PUFAHL, Receiver of the Austin National Bank of Chicago, Illinois, a Corporation,
Petitioner,

vs.

ESTATE OF ELVIRA J. PARKS, Deceased,
Respondent.

Brief for Respondent.

I.

STATEMENT OF THE CASE.

We believe that the statement contained in petitioner's brief is adequate.

II.

QUESTIONS PRESENTED.

We believe the statement in petitioner's brief as to the questions presented is sufficient.

III.

SUMMARY OF ARGUMENT.

(A) The law of Illinois governs the enforcement of the instant claim, *unless it is inadequate for that purpose, or unless it thwarts or impedes such enforcement.*

(B) The law of Illinois is adequate for the enforcement of the instant claim, and does not discriminate against it.

(C) The instant claim is a "debt" or "demand" within the meaning of Section 70 of the Illinois Statute of Non-Claims.

(D) Consideration of points in petitioner's brief.

(E) Conclusion.

ARGUMENT.

A.

The law of Illinois governs the enforcement of the instant claim, unless it is inadequate for that purpose or unless it thwarts or impedes such enforcement.

The proposition above stated seems to us to be established conclusively by the two cases which were decided by this court on February 4, 1935, to wit:

Forrest v. *Jack,* 294 U. S. 158.
Seabury v. *Green,* 294 U. S. 165.

While these cases and the case of *Matteson* v. *Dent,* 176 U. S. 521, referred to therein, differ from one another in their facts, the common thread which runs through them all, is the proposition that the law of the state where the claim is sought to be enforced will control, unless it is inadequate or discriminatory. It is apparent, upon a study of these cases, that the laws of the states of Utah, Minnesota and South Carolina differ very greatly; in the cases arising under the laws of Minnesota and South Carolina, claimants were able to recover and in the case arising under the law of Utah, the claimant was not, but in all of the cases the law of the forum was applied, with no suggestion that the claims in question were entitled to other than the treatment afforded all claims of the same general class to which they belonged, whether arising under the Federal statute in question or otherwise.

In *Forrest* v. *Jack, supra,* the court in its opinion on page 163, says:

> "In the absence of Federal enactments relating to procedure for the enforcement of liability imposed by Section 66, collection is to be made in accordance with state laws governing claims against deceased persons, at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority. There is no suggestion that the laws of the State of Utah discriminate against or are inadequate for the just or convenient enforcement of the liability imposed against estates of deceased stockholders."

In *Seabury* v. *Green, supra,* the court, in its opinion on page 169 used the following language:

> "As suggested in *Forrest* v. *Jack, supra,* the enforcement of liability imposed by Section 66 may not be thwarted or impeded by state law."

It is apparent that no Federal enactments, implementing the act in question, were pointed out to the court in connection with the presentation of those cases. The point would seem to be established, therefore, beyond question, that if the State of Illinois has laws within the purview of which the collection of the instant claim would come, such laws control unless they are "inconsistent with enforcement of the liability imposed by national authority" or unless they tend to "thwart or impede" its enforcement. It seems to us that the following cases cited by petitioner in his brief support the same view, to wit:

> *Matteson* v. *Dent,* 176 U. S. 521 (cited on page 9 of petitioner's brief);

Drain v. *Stough*, 61 Fed. (2nd) 668 (cited on page 12 of petitioner's brief);
Mann v. *Kleisdorf*, 16 Fed. (2nd) 997 (cited on page 16 of petitioner's brief).

While we do not wish to be understood as agreeing with all the elements of the decisions in the last two of the cases above cited, we submit that in the *Drain* case the decision was based upon the law of the State of Washington, (see quotation from said case at the bottom of page 14 of petitioner's brief), and in the *Mann* case, upon the law of the State of Mississippi.

The quotation from the last mentioned case shown in italics at the top of page 18 of petitioner's brief, would seem to indicate that the court was specifically following the law of Mississippi in its decision.

B.

The law of Illinois is adequate for the enforcement of the instant claim, and does not discriminate against it.

We understand the opinions in the cases of *Forrest* v. *Jack* and *Seabury* v. *Green*, *supra*, to mean that claims arising under the Federal act in question, must be given fair treatment, that is, the same treatment afforded other claims of the same general class, arising under other than the act in question. At various points in petitioner's brief, it is suggested that the instant claim, for the reason that it is created by a Federal statute, is entitled to some kind of preferred treatment to which ordinary claims are not entitled. We believe this idea, which seems to have been entertained also by the courts deciding some of the older cases cited, was due primarily to the language used in the

opinion in the case of *Zimmerman* v. *Carpenter,* 84 Fed. 747, extensive quotations from which appear on pages 11 and 12 of petitioner's brief. The Court in that case very apparently proceeded on the theory that the claim was not "an ordinary claim," and also on the theory that the Federal statute created an equitable lien upon assets of decedents, which last theory we shall discuss more fully under point C of our argument. We do not understand that these theories are tenable since the *Forrest* v. *Jack* and *Seabury* v. *Green* cases were decided by this court.

In order for us to consider the adequacy of the Illinois law for the purpose of the enforcement of the instant claim, it will be necessary for us to consider what the Illinois law is, as to the enforcement of claims against estates of decedents, and also as to enforcement of contingent claims.

For the determination of the first point, we refer to Section 70 of the Illinois Administration Act, the pertinent portions of which are set forth in the appendix on page 31 of petitioner's brief.

The sixth sub-section of said Section 70 provides that all claims and demands of whatever class, not exhibited to the court within one (1) year from the granting of letters, shall be forever barred as to the property and estate of the deceased which has been inventoried or accounted for by the executor or administrator. It is our contention that the instant claim would fall within this classification, although more detailed discussion of that specific point is reserved to subdivision "C" of our argument.

Secondly, we call attention to the law of Illinois applicable to claims which remain contingent during the entire time allowed by law for presenting of claims against estates. It is conceded by both parties hereto that the instant claim was contingent until after the expiration of

one year following the issuance of letters testamentary in the estate of Elvira J. Park.

The law of Illinois as to the point is well stated in the leading case of *Union Trust Company* v. *Shoemaker,* 258 Ill. 564. We quote from the opinion of the court, commencing on page 570:

> "Walter Shoemaker's estate having been finally settled more than two years before the filing of this bill without any claim having been presented against his estate, plaintiff in error insists that the claim is barred by section 70 of the Administration act, except as to property not inventoried. That section, prior to its amendment in 1903, by its seventh clause, provided that all demands not exhibited within two years from the granting of letters should be barred except as to estate not inventoried or accounted for. Section 67 provides that a claim not due may be presented and allowed, with a proper rebate of interest. This section refers only to claims on which there is an absolute liability though the time of payment is postponed, but has no reference to claims dependent upon a contingency which may or may not ripen into a liability. The holder of a claim of the latter class is not a creditor of the estate under the statute and cannot have his claim allowed. If his claim remains contingent during the whole of the two years allowed for the exhibition of claims against the estate, he cannot participate in the distribution by the administrator unless he finds estate of the deceased not inventoried or accounted for. (*Stone* v. *Clarke,* 40 Ill. 411; *Dugger* v. *Oglesby,* 99 *id.* 405; *Snydacker* v. *Swan Land and Cattle Co.,* 154 *id.* 220; *Mackin* v. *Haven,* 187 *id.* 480; *Pearson* v. *McBean,* 231 *id.* 536.) That Shoemaker's liability on the bond was contingent is manifest, for there could be no breach

of the condition until judgment in the action, which was not until more than two years after distribution and settlement of the estate.

"It does not follow, however, because the claim may not share in the distribution by the administrator, that the holder is barred from pursuing the assets, real or personal, into the hands of the heirs, devisees or legatees. Such conclusion would follow if the claim had been of such a character that it could have been presented to and allowed against the administrator. The law having given a remedy in such case, it must be pursued. But the limitation established by section 70 of the statute is not a general limitation upon all remedies against the property of deceased persons. The Administration act is a specific act adopted for the particular purpose of facilitating the early settlement of the estates of deceased persons. (*Waughop* v. *Bartlett*, 165 Ill. 124.) Demands against such estates must be exhibited within two years from the grant of administration, but where the demand is of such a nature that it is during all of such period of two years merely a contingent liability and not a fixed obligation of the estate, it cannot be allowed or considered in the settlement of the estate by the administrator. This limitation, which has been reduced to one year by the amendment of 1903, does not, however, apply to actions against heirs, devisees or legatees to subject property of the estate received by them to the payment of contingent liabilities of the deceased. Such actions, if otherwise maintainable, are subject only to the general Statute of Limitations."

The court further points out the derivation of the remedy outlined in the previous quotation. We quote further from the same opinion on page 573:

> "Although no action at law lies, or ever did lie, against destributees of personal property, whether legatees or heirs, for a debt of the ancestor, the ancient remedy by a bill in equity for a discovery, if necessary, and an account of assets received applicable to the payment of the decedent's debts, still continues. This jurisdiction had its origin not only in the general authority over trustees and trusts, but in the imperfect and defective power of the ecclesiastical courts. It was sufficient that a debt existed against the estate of a decedent and that there was property which should be applied to its payment to justify the interposition of the court of equity, but where distribution had been made another creditor could not ask for a return of the money or a proportional part from the distributees if he had received notice of the proceedings or had been guilty of *laches* or unreasonable delay. (*Public Works* v. *Columbia College*, 17 Wall. 521.) No question can exist of the validity of the excuse for the failure of the defendant in error to present its claim to the administrator before distribution, or of the equity of the position that the legatee who is a volunteer should not retain the property of the estate while a creditor goes unpaid."

To the same effect are the following cases:

Stone v. *Clarke's, Admrs.*, 40 Ill. 411;
Mackin v. *Hoben*, 187 Ill. 480;
Pearson v. *McBean*, 231 Ill. 536;
Union Trust Co. v. *Shoemaker*, 258 Ill. 564:
Chicago Title & Trust Co. v. *Fine Arts Bldg.*, 288 Ill. 142;
Beebe v. *Kirkpatrick*, 321 Ill. 612.

The attorneys for petitioner are also correct in the statement contained on page 23 of their brief, to wit: that the principle stated in the above case of *Union Trust Company* v. *Shoemaker, supra,* is the law of Illinois, "even though there may remain in the hands of the executors or administrators undistributed inventoried assets of value sufficient to pay such claim." This principle of law is enunciated in the following cases:

Snydacker v. *Swan Land and Cattle Company,* 154 Ill. 220;
Pearson v. *McBean,* 231 Ill. 536;
Rassieur v. *Jenkins,* 170 Ill. 503;
Stone v. *Clarke's Administrators,* 40 Ill. 411;
Morse v. *Pacific Railway,* 191 Ill. 356.

In the case of *Pearson* v. *McBean* above cited, a contingent claim became absolute after the expiration of the period for filing claims against the estate and the executors had a sufficient amount of the estate in their hands, as executors, to pay the amount claimed to be due. The court said in its opinion, on page 540:

> "and the fact that the entire estate of McBean had not been distributed, but a sufficient amount thereof remained in the hands of his executors to satisfy appellant's claim at the time the suit was commenced does not affect the result, as the assignee in the *Rassieur* case and the executors in the *Morse* case * * * each had ample funds in their hands with which to satisfy claims which were held to be barred." *

It is apparent, therefore, that the claimant in this case has a perfectly clear legal right under the established law of Illinois above set forth to proceed against the beneficiaries under the will of Elvira J. Park for the collection of the claim in question, up to the full value of property

received or to be received by them under the will of said decedent.

We do not believe, therefore, that the law of Illinois can be said to be "inadequate for the enforcement of the instant claim," or that it "thwarts" or "impedes" its enforcement.

Much is made of the point in petitioner's brief (pages 18 and 26), that the Illinois law applicable to the collection of contingent claims might, in a possible situation, cause delay in the collection of claims, with the effect of hindering the closing of a national bank receivership. The contention is made with apparent seriousness that such a result would constitute the "discrimination" or "thwarting" specified in the cases of *Forrest* v. *Jack* and *Seabury* v. *Green, supra.*

In the first place, this contention is the creature of a very lively imagination; it reminds us of the farmer boy who erected a scare-crow so awe-inspiring and terrible that it nearly scared him to death when he happened on it at night. In the second place, we do not believe this court had any such purely incidental inconveniences in mind. Certainly, a case might be imagined, where a claimant might be delayed due to unusual circumstances, such as the inability to sell real estate owned by the decedent in a dead market. However, there are other sections of the Administration act of Illinois imposing definite obligations upon administrators or executors with reference to the prompt closing of estates. We refer to Sections 112 and 114, which are shown on pages 21 and 22 in the Appendix to this brief. It would seem to us that a reading of those provisions will demonstrate that ample machinery is provided for enforcing the prompt closing of estates in Illinois.

We think the kind of argument above referred to, comes from perhaps an unconscious conviction on the part of attorneys for petitioner, that any obligation arising under a United States statute is necessarily superior to any obligation arising under the law of a mere state. It was the settled law of this country, as we understand it, up to a fairly recent date and perhaps even at this time, that the laws of the national government and of the states are supreme, each in its own proper sphere, and that there is no question involved of the superiority of one over the other, except when one invades the proper sphere of the other.

C.

The instant claim is a "debt" or "demand" within the meaning of Section 70 of the Illinois Statute of Non-Claim.

The contention of petitioner's brief (pages 9, 11) seems to be that the instant claim is not one that comes within the purview of the Illinois Statute of Non-Claim; that the Federal act creates a kind of equitable lien upon the undistributed assets in the hands of the executors, and that although no provision is made for enforcement of same under the Federal act itself, it is the duty of the state court to exempt the claim from the operation of its Statute of Non-Claim and to work out some other procedure for its enforcement. In other words that Congress intended the liability created to be like the "Joker" in the old fashioned deck of cards—able to take any trick.

We presume that this contention is due partially to the somewhat puzzling language used in the Federal act: "the estate and funds in their hands shall be liable in like manner and to the same extent as the testator * * * would be if

living." In trying to arrive at the meaning of this language, let us inquire what would have been the liability of Elvira J. Park if she had been living at the time the assessment was made by the Comptroller?

We submit that she would have been liable in the same degree and in the same manner as she would have been liable upon a promissory note which stood past due. As a practical matter, it would have been necessary, in order to stop the running of the statutes of limitation, for the holder of such a promissory note to have reduced same to judgment before he could have obtained anything resembling a lien upon the property of the debtor. In the same manner it would have been necessary for this receiver to have reduced his claim against Mrs. Park to judgment if he wished to obtain any lien or stop the running of the statute of limitation. If he had not done so, the claim would have been barred ultimately by statutes of limitation or by the general theory of laches, or property of the stockholder applied in payment of other obligations.

How was the situation changed by the death of the stockholder? The Comptroller's assessment was in one sense a liability against the estate of the decedent as soon as it was made, but in order to make such liability effective, it was necessary that same be reduced to judgment, or, in other words, that the claim be filed in the Probate Court in which her estate was pending or if the time for presentation had already elapsed, to bring a bill in chancery to reach assets already distributed, or if he cared to do so, to wait until the closing of the estate and then to proceed against the distributees. In the same manner that the liability against the stockholder, when living, would have been subject to the limitations imposed on general claims of that nature against living persons by the law of the State of Illinois, so the claim against the estate is subject to the limitations

imposed by the laws of the State of Illinois relative to the enforcement of claims against estates of decedents. We believe that some of the cases give too much weight to the words of the act "the estates and funds in their hands shall be liable" and overlook the qualifying words immediately following "in like manner and to the same extent as the testator * * * would be if living. * * *"

It seems to us that the meaning of the Federal act is more logical and understandable when it is construed in the manner above set forth, than if it is construed as creating a sort of equitable lien. It is easier to believe that Congress, in enacting the law in question, had in mind the methods used in the various states for the handling and collection of claims against deceased estates instead of embarking upon a new and untried method of enforcement. It is true that the laws of the states differ as to the methods of presentations and proving of claims, but it is also a matter of common knowledge that the creditors of banks, in the vast majority of instances, live in the same jurisdictions as the stockholders in the same banks, and there is nothing strange whatsoever in the assumption that Congress intended that the laws applicable to the collection of claims for stock liability, should be the laws in common use in the jurisdictions in which both the creditors and the stockholders were resident.

It would also seem to us that had it been the intention of Congress to create a lien, it would have more definitely defined the lien so created and provided a method for its enforcement. As a matter of common sense, it is easy to see that any attempt along that line would be very hazardous, as it would put a very uncertain element in the settlement of estates and raise difficulties as to practical enforcement which would be almost insuperable.

It is apparent that the petitioner in this case did not proceed upon the supposition that he was entitled to any kind of lien. He filed his claim in the Probate Court of Cook County, Illinois in the manner provided by statute for filing claims. He was charged with the knowledge of the Illinois law applicable to contingent claims which have become absolute after the expiration of the time fixed for the filing of claims. It was only after the case had reached the Appellate Court that he presented the equitable lien theory.

It seems likely that the option of the court in *Zimmerman* v. *Carpenter,* 84 Fed. 747, *supra,* had much to do with the origin of the theories heretofore referred to, to wit: That the Federal statute created a lien, and second, that the claim was not an ordinary claim.

In this connection we believe it is incumbent upon us to carefully analyze the case of *Mortimer* v. *Potter,* 213 Ill. 178, which was largely based upon the *Zimmerman* case, *supra.* The *Mortimer* case is very much relied upon by the petitioner in his brief, and is also used as authority for the decisions rendered by Judge Lindley in the cases quoted at such length in petitioner's brief and in the Appendix thereto. Several statements are made in the opinion of the court in the *Mortimer* case which apparently support petitioner's contentions and which are much relied upon by him. We think however that the importance of these conclusions will be very seriously diminished upon a careful consideration of the case itself. The facts in the case were as follows:

One Charles Cavanagh owned 10 shares of the capital stock of the National Bank of Illinois. He died testate on April 1, 1873, leaving a will, by which he vested all his estate in two trustees, one of whom was his widow. She

was to receive the income of the entire trust during her lifetime, and to have the right to dispose of part of the corpus thereof by her will, the balance to go to certain specified legatees. The estate of said decedent was administered upon and settled in due course of administration about two years after his death. In 1896 the bank failed and in 1899 the Comptroller of the Currency ordered an assessment of 100% upon the stock. The widow died shortly after the assessment, leaving a will, disposing of the portion of the trust estate which she had been given the right to dispose of under her husband's will. After her death the surviving trustee, disregarding the assessment by the Comptroller which had been previously made, made complete distribution of the trust estate to the beneficiaries. The receiver of the insolvent bank then filed a bill in chancery to collect the assessment, making the surviving trustee and the persons to whom he had distributed the trust estate parties. The defendants relied principally upon two points, the first being that the bank stock had become the property of the widow; that the claim, therefore, should have been presented against her estate, and not having been presented, the same was barred. The other contention was that the claim was barred by the Statute of Non-Claim of the State of Illinois, because it had not been filed against the estate of the original stockholder who had died and whose estate had been settled twenty-five years prior to the accrual of the claim as an absolute liability.

The court held very properly that the first defense was ineffectual, for the reason that the widow had never become the owner of the stock, but was entitled only to receive dividends therefrom during her lifetime. As to the other defense, the court held that the claim could not have been presented against the estate of the original stock-

holder, because the estate had been closed prior to the accrual of the claim, stating, "the liability arose more than 20 years after the expiration of the two years within which claims could have been filed against it in the Probate Court."

The court then directed the entry of a judgment against all the defendants—"primarily against the trustee as such —secondarily against the legatees and distributees—ultimately against the trustee personally".

We believe that the decision of the court was correct based upon the law of the State of Illinois as it existed at the time of the decision of the case and as it now exists. The established law as previously set forth in this brief was, that a claim remaining contingent during the period provided for the presentation of claims against the deceased's estate, was not barred as against distributees, and could be enforced against them to the value of their distributive shares received from the estate. See *Union Trust Company* v. *Shoemaker supra.* The surviving trustee in the above case was liable on two theories: First, as a distributee of the estate of the original stockholder, and secondly as the owner of the bank stock standing in his name. It is apparent that under the will of said deceased stockholder, title to the bank stock passed to the trustees and upon the death of one of the trustees to the survivor. It was, therefore, the duty of the trustee, both as a distributee of the estate and as a present holder of title to the stock, to satisfy the claim of the comptroller before parting with the trust assets in his hands. Holding the trust assets as a distributee, he was liable under the settled law to the full amount of property held by him as such trustee; holding title to the stock as an owner at the time the liability accrued, to-wit: when the comp-

troller's assessment was made, he was directly liable under the act as an owner. However, in the latter case he would not be protected by any statute of non-claim which would have been the case if he had held the stock as an executor. The laws of Illinois do not provide any procedure for the presentation of claims against trustees or regulate the time within which such claims must be presented.

Although the above decision is sustainable upon the above grounds, it is apparent that the court, to a considerable extent, rested its decision upon the case of *Zimmerman* v. *Carpenter, supra,* which has been previously discussed. The court at least gave lip service to the theories of equitable lien and uniqueness of claim enunciated in the *Zimmerman* case. Inasmuch, however, as that case purported to construe a Federal act, the ultimate construction of which is the duty of this court, we do not believe that the *Mortimer* case can be considered as controlling in any way. It is apparent that the court in that case did not have clearly in its mind, the law applicable to contingent claims, which was enunciated so clearly in the case of *Union Trust Company* v. *Shoemaker, supra.* Stripped of the features incident to its attempted construction of the Federal act, the court arrived at the correct conclusion, namely, that the assets in the hands of the distributees were liable to the claim.

The fact is stated on page 21 of petitioner's brief that *Mortimer* v. *Potter* case was cited with approval by the Supreme Court of Illinois in the case of *Kingston* v. *Old National Bank of Centralia,* 359 Ill. 192. From an examination of the last mentioned case it appears that the *Mortimer* case is cited on page 204 of the opinion, but as authority for a point not at issue in the instant case, to wit, that the liability imposed by the Wisconsin Statute sur-

vived the death of the stockholder and was enforceable against his executors.

It is also to be noted that in the *Mortimer* case, the receiver filed a bill in equity which was the appropriate method of reaching assets in the hands of distributees. In that kind of proceeding he was clearly entitled to relief to which he would not have been entitled in a proceeding against the estate of the deceased stockholder. The receiver in the instant case had his option, whether he would file a suit in equity to reach assets in the hands of distributees or file a claim against the estate in the Probate Court of Cook County. He should have been perfectly conversant with the fact that a claim in the Probate Court is bound by the statutory proceeding provided for the conduct of that court.

D.

Discussion of cases cited in petitioner's brief.

It is apparent that petitioner places great reliance upon the cases decided by Judge Lindley in the District Court of the United States for the Eastern District of Illinois, to wit: *William M. Below, Receiver,* v. *First National Bank of Danville* (decision not reported) and *G. B. Drake, Receiver* v. *Dilatush* (decision not reported), extensive quotations from which may be found on pages 15, 16, 23, 24 and 25 in petitioner's brief, and the opinions in which may be found *in extenso* in the appendix attached to petitioner's brief. The decisions in those cases were based largely on the theory that the claims did not come under the purview of the Illinois act of non-claim and also on the theory that the application of the Illinois law would have the effect of thwarting the enforcement of the claims involved. Inasmuch as we have considered such theories

exhaustively and presented, as we believe, conclusive answers to same, we shall not take the time of the court in further analyzing the reasons which Judge Lindley gave for his conclusions. He places great weight upon *Mortimer* v. *Potter, supra,* although it apparently did not occur to him to examine carefully the reasoning by which that court arrived at its conclusions.

CONCLUSION.

We believe that we have demonstrated that the opinion of the Appellate Court of Illinois was correct, and that same should be affirmed by the decision of this Court.

Respectfully submitted,

EMMETT J. McCARTHY,
ROBERT F. CAREY,
Counsel for Respondent.

FRANZ W. CASTLE,
Of Counsel.

APPENDIX.

Statutes Involved.

Section 64, Title 12, U. S. C. A.

The portion of the above statute is correctly set out in the Appendix to petitioner's brief.

Section 66, Title 12, U. S. C. A. provides:

> "Persons holding stock as executors, administrations, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be, if living and competent to act and hold the stock in his own name."

Section 70 of the Illinois Administration Act (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935).

The portion of this statute as set out in the Appendix in the Petitioner's brief is correctly stated.

Section 112 of the Illinois Administration Act (Ch. 3, Par. 114, Illinois Revised Statutes, 1935), provides as follows:

> "Every executor and administrator shall exhibit a report of his administration to the County Court, from which the letters testamentary or of administration were obtained, within thirty days after the expiration

of one year after date of his letter, and thereafter, whenever required by the court, until the duties of administration are fully completed. At any time during the course of administration an executor or administrator may file a final report of his administration to a specified date, and in like manner from time to time file final reports to specified dates, but no such final report or final report at the conclusion of administration shall be approved by the court unless the heirs at law of the decedent, the legatees and/or devisees under the will and the creditors, if any, of the decedent, shall have been notified thereof in such manner as the court may have directed.

"In all cases where a hearing shall have been had in open court upon any final report of an executor or administrator upon notice as hereinbefore provided, all parties in interest shall be bound by the order of the court in relation to such report, in the absence of fraud, accident or mistake."

Section 114 of the Illinois Administration Act (Ch. 3, Par. 116, Illinois Revised Statutes, 1935), provides as follows:

"The County Courts of this State shall enforce the settlements of estates within the time prescribed by law, and upon the failure of an executor or administrator to make settlement within thirty days after the expiration of said time, the court shall order a citation to issue to the sheriff of the county where the executor or administrator resides, or may be found, requiring said executor or administrator to appear on a day within thirty days thereafter, to be designated in such citation and make settlement of the estate, or show cause why the same is not done; and if an execu-

tor or administrator fails to appear at the time required by such citation, the court shall order an attachment requiring the sheriff of the county where the executor or administrator resides, or may be found, to bring the body of said executor or administrator before the court and upon a failure of an administrator or executor to make settlement under the order of the court after having been so attached, he may be dealt with as for contempt, and shall be forthwith removed by the court, and some discreet person appointed in his stead; the costs of such citation or attachment to be paid by the delinquent executor or administrator, and the court shall enter a judgment therefor, and a fee bill may issue thereon. All moneys, bonds, notes and credits which any administrator or executor may have in his possession or control as property or assets of the estate, at a period of two years and six months from the date of his letters testamentary or of administration, shall bear interest, and the executor or administrator shall be charged interest thereon from said period at the rate of ten per cent, or after two years and six months from any subsequent time that he may have discovered and received the same, unless good cause is shown to the court why such should not be taxed."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936.

No. 18

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, A CORPORATION,
Petitioner,

vs.

ESTATE OF ELVIRA J. PARKS, DECEASED,
Respondent.

ANSWER OF RESPONDENT TO SUPPLEMENTAL MEMORANDUM FILED ON BEHALF OF PETITIONER.

EMMETT J. McCARTHY,
ROBERT F. CAREY,
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ANSWER OF RESPONDENT TO SUPPLEMENTAL MEMORANDUM FILED ON BEHALF OF PETITIONER.

We beg leave to reply very briefly to the Supplemental Memorandum filed by petitioner, which seems to contain some new matter not included in his original brief.

We shall not attempt to controvert Petitioner's contention that the probate courts of Illinois have equitable jurisdiction in connection with the settlement and allowance of claims against estates of decedents. Even then, however, we are confronted with the following question:

"Could the probate court of Cook County have legally allowed the instant claim, without qualification, against the estate of the deceased stockholder and ordered the Executors to pay same in due course of administration out of inventoried assets?" We believe that many of the cases cited in Respondent's brief answered this question in the negative but, for the sake of brevity, we desire to refer to only two. The first one, *Stone* v. *Clarkes, Administrators*, 40 Ill. 411, is authority for the proposition that a contingent claim presented after the lapse of time provided for the filing of claims against the estates of decedents is barred as against the administrator, except as to assets discovered and inventoried after the expiration of the period for filing claims. The *Stone* case, *supra*, is the leading case in Illinois and has been approved repeatedly by the Illinois courts and may be considered as stating the settled law of Illinois.

The other case to which we refer is *Chicago Title & Trust Co.* v. *Fine Arts Building*, 288 Ill. 142, 156 and 157. This case is authority for the proposition that a contingent claim becoming absolute after the expiration of the time for filing claims cannot share in inventoried assets, even though the estate be not closed and there be undistributed assets in the hands of the Executors.

In both of the above cases the decisions of the Supreme Court were rendered on original appeals from probate or county courts, which courts have the same jurisdiction in Illinois with reference to probate of estates of decedents. Equity powers which such courts are shown to possess by the cases cited in petitioner's "Memorandum" must have been taken into consideration by the courts of last resort which decided the cases in question.

It is of course fundamental that equity follows the law. After a particular field of law has been completely oc-

cupied by statutory enactment and by decisions of the courts of last resort, it would seem to leave no ground for the interposition of purely equitable principles. It will be noted that in none of the cases cited in petitioner's "Memorandum" is there any holding that the probate courts may, under any circumstances depart from the provisions of the Statute of Non-Claim.

We do not wish to be understood as saying that a court of general equity power might not, upon presentation of recognized grounds of equity jurisdiction, obtain relief not inconsistent with the statutory law of Illinois, but supplementary thereto. However, the right of the probate courts to give such relief has been foreclosed by the decisions of the Supreme Court of Illinois.

We believe that the remainder of petitioner's "Memorandum" is occupied with merely a restatement of arguments already made in his brief, and inasmuch as same have been answered in our brief we refrain from answering them here.

Respectfully submitted,

EMMETT J. MCCARTHY,
ROBERT F. CAREY,
Counsel for Respondent.

FRANZ W. CASTLE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 18.—October Term, 1936.

M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, Petitioner,

vs.

Estate of Elvira J. Parks, Deceased.

On Writ of Certiorari to the Appellate Court of the First District of the State of Illinois.

[December 7, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

In this case we are concerned with the bearing of state law upon the enforcement of an assessment against the estate of a stockholder of a national bank.

Elvira J. Parks died March 20, 1928, owning twelve shares of the capital stock of the Austin National Bank of Chicago. May 17, 1928, the Probate Court of Cook County, Illinois, granted letters testamentary to the executors named in her will, who filed an inventory and supplemental inventory in the probate court within one year of the date of the letters. March 30, 1931, the Comptroller of the Currency declared the bank insolvent, closed it, and appointed the petitioner receiver, and May 21, 1931, assessed all stockholders, including the executors of Elvira J. Parks, one hundred per cent of the par value of their stock. The executors refused to honor the receiver's demand for payment, and on September 1, 1933, he filed his claim in the Probate Court for $1,327.17, the amount of the assessment with interest to the date of filing. January 13, 1934, the court disallowed the claim. The receiver appealed to the Circuit Court where the case was tried *de novo*. That court, applying a state statute, disallowed the claim as against undistributed assets in the hands of executors inventoried within one year from the date of the grant of letters because the claim did not accrue and was not presented to the Probate Court within that period, but allowed it as to assets not inventoried within the year.

(From a stipulation filed in this court it appears that there are in the executors' possession inventoried assets in excess of the amount of petitioner's claim; that the estate is solvent; and that there are no assets not inventoried within one year from the granting of the letters, or discovered after the expiration of that period.) The Appellate Court of the First District of Illinois affirmed the judgment. A certificate of importance, requisite for a review by the Supreme Court of the State, was refused. Certiorari was granted to resolve a conflict respecting the construction of relevant federal statutes.

U. S. C. Tit. 12, Sec. 64 is in part:

"The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof, in addition to the amount invested in such stock . . ."

Section 66 is:

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

The petitioner asserts these sections give his claim a quality so superior to that of other contingent claims against a decedent's estate that it must be recognized by state tribunals without regard to limitations upon allowance imposed by state laws.

The liability is imposed by the statute.[1] The original subscriber and likewise an immediate or remote vendee of the shares assumes a status,—that of stockholder. The assumption of this status involves whatever conditions or burdens the federal statutes have imposed as incident to the holding of national bank shares. The contingent obligation to pay an assessment is rendered absolute by the Comptroller's action in ordering one; whether that action be taken during the stockholder's life or after his death. From the moment of the Comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder, or the executor of a deceased

[1] *McClaine* v. *Rankin*, 197 U. S. 154, 161; *Christopher* v. *Norvell*, 201 U. S. 216, 225; *McDonald* v. *Thompson*, 184 U. S. 71, 73, 74; *Forrest* v. *Jack*, 294 U. S. 158, 162.

stockholder. And if assessment be made after the estate of a deceased stockholder has been distributed the receiver may proceed to recover the amount from distributees or heirs, if, and to the extent, they are liable for debts of the estate under the law of the domicile.[2]

The first clause of section 66 obviously was intended to exempt from personal liability the executor, administrator, guardian or trustee who holds stock as such fiduciary whether standing of record in his name or in that of the decedent, ward, or settlor. The second declares that the estate and funds in the hands of an executor shall be liable as the testator would have been if living, competent, and a stockholder of record. The question is whether this clause adds anything to the obligation of the decedent which is cast upon his estate by operation of law irrespective of Section 66.[3] Does it impose upon the estate a liability differing from that which the law fastens upon the personal representative to discharge out of the estate, debts accruing before or after the decedent's death? We think that, as the first clause exonerates the fiduciary from personal liability, the second negatives the inference that the exoneration is to extend to the decedent's estate. This was the view taken by Judge Shipman in *Davis* v. *Weed*, 7 Fed. Cas. 186 (44 Conn. 569):

"I do not think that section 5152 [§ 66] was intended to affect the liability for assessments of estates in process of settlement. The principal object of the section was to prevent a personal liability from running against executors, administrators, trustees or guardians, who had purchased as trustees, or to whom had been transferred in their names as trustees national bank stocks for the benefit of the trust estates. Having by such purchase voluntarily entered into a contingent liability for assessments, it might be claimed that a judgment *de bonis propriis* could be rendered against them. The main object of the section was to prevent personal judgments being rendered against such persons in whom the stock stood on the books of the bank as trustees."

The statute evidences no intent to prefer the assessment over other claims against the estate, or to exempt the receiver from the pursuit of the remedy prescribed by the local law for collection of claims of the same sort.

Section 64 gives the receiver no lien for the amount of the assessment against the property of a living stockholder. The claim may

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[2] *Matteson* v. *Dent*, 176 U. S. 521; *Forrest* v. *Jack*, *supra*; *Seabury* v. *Green*, 294 U. S. 165.

[3] *Matteson* v. *Dent*, *supra*.

only be recovered by suit or action. The judgment obtained is collectible like any other; it has no preference in distribution if the debtor's property be in the hands of a receiver, if he has made an assignment for the benefit of creditors, or become bankrupt. Section 66 makes a deceased stockholder's estate liable in like manner, and to the same extent, as he would have been if living. As no lien is created against the property of a living stockholder by section 64 section 66 imposes none against his estate.[4]

The statute creates an unsecured and unpreferred claim against a decedent's estate. Where the assessment has been made in the decedent's lifetime an accrued and provable debt exists against his estate; if made after his death a claim against the funds and assets of the estate accrues as of the date of assessment.

Although the petitioner's demand is based upon a federal statute, he may enforce it only in conformity to the law of the forum governing the recovery of debts of like nature. He might have sued in a federal court. Notwithstanding the statute providing that the citizenship of a national bank, for purposes of federal jurisdiction, shall be as if it were a corporation of the state where it has its place of business, the receiver is an officer of the United States and, as such, entitled to sue for assessments in a federal court, irrespective of the citizenship of the parties or the amount in controversy.[5] If he elect so to do, R. S. 721 (28 U. S. C. Sec. 725) governs the trial:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In such a proceeding the state statute of limitations will be applied;[6] and it seems that the local substantive law governing

[4] In *Witters* v. *Sowles*, 32 Fed. 130, 140, and in *Drain* v. *Stough*, 61 F. (2d) 668 there are statements that the statute imposes a lien on estate assets. In *Rankin* v. *Miller*, 207 Fed. 602, 611 one ground of decision was that such a lien existed. So in *Drake* v. *Dilatush*, 16 F. Supp. 120, the District Court for Eastern Illinois by decree imposed a lien upon the assets of a decedent's estate held by the executor, under circumstances like those presented in the instant case.

[5] *Kennedy* v. *Gibson*, 8 Wall. 498; *Price* v. *Abbott*, 17 Fed. 506; *Armstrong* v. *Trautman*, 36 Fed. 275; *Brown* v. *Smith*, 88 Fed. 565; *Stephens* v. *Bernays*, 41 Fed. 401, affirmed by C. C., 44 Fed. 642; *Rankin* v. *Herod*, 140 Fed. 661. See also *United States* v. *Weitzel*, 246 U. S. 533, 541.

[6] *McDonald* v. *Thompson*, *supra*; *McClaine* v. *Rankin*, *supra*; *Morgan* v. *Hamlet*, 113 U. S. 449.

property rights in stock will be observed.[7] Nor does the principle that the jurisdiction of courts of the United States cannot be defeated by a state's laws limiting redress of its own citizens to certain tribunals[8] create such inconsistency or conflict as to require the overriding of the law of the state with respect to distribution of the estate of a decedent. Where, as here, a *res* has come into the possession and under the control of a state court, one having a right to go into the federal court, either by reason of diversity of citizenship, or because he is a federal officer, cannot obtain a judgment or decree entitling him to interfere with the administration of the *res* by the court having its possession. While he may not be denied his right to prosecute an action to judgment or a suit to final decree in the federal court, such judgment or decree can do no more than adjudicate the validity and amount of his claim. The marshalling of that claim with others, its priority, if any, in distribution, and all similar questions, are for the probate court upon presentation to it of the judgment or decree of the federal court.[9] Thus, though a receiver should resort to the United States District Court he would need to present, in a probate court, any judgment obtained, if he desired payment from the assets under the control of the latter.

The receiver may, as petitioner elected to do, prosecute his claim in a state court. If he does, at least in the absence of Congressional declaration to the contrary, the litigation will be governed by the common and statutory law of the state. Thus the local statute of limitations applies;[10] and the local law as to the extinguishment of the estate and the liability *vel non* of distributees controls.[11]

If the state law requires a claim for an assessment to be prosecuted in an action of debt the receiver cannot elect to bring some other form of action or to sue in equity; conversely, if the law prescribes a suit in equity the receiver cannot bring an action at law. And if under the state statutes demands against a decedent's

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[7] *Keyser* v. *Hitz*, 133 U. S. 138; *Christopher* v. *Norvell*, *supra*.

[8] *Suydam* v. *Broadnax*, 14 Pet. 67; *Union Bank* v. *Vaiden*, 18 How. 503; *Hyde* v. *Stone*, 20 How. 170; *Lawrence* v. *Nelson*, 143 U. S. 215.

[9] *Yonley* v. *Lavender*, 21 Wall. 276; *Byers* v. *McAuley*, 149 U. S. 608; *Security Trust Co.* v. *Black River National Bank*, 187 U. S. 211, 227.

[10] *McDonald* v. *Thompson*, *supra*; *McClaine* v. *Rankin*, *supra*.

[11] *Matteson* v. *Dent*, *supra*; *Forrest* v. *Jack*, *supra*; *Seabury* v. *Green*, *supra*.

estate must be proved in a probate court the receiver cannot pursue some other form of action. This is not to say that a state may deny all remedy for the substantive right arising out of the federal statute (see *Seabury* v. *Green, supra*); it is merely to say that if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character, there is no warrant for exempting the claim from the effect of local statutes governing procedure or limiting the time for prosecution of action.

The petitioner, having elected to prove his claim in the appropriate state court, is bound by the laws of Illinois as to the enforcement of such claims, provided those laws are nondiscriminatory and operate equally upon all claims of the class in which his belongs.

The relevant statute is section 70 of the Illinois Administration Act [12] which provides that five classes of claims against decedents' estates shall be preferred in the order named, e. g., funeral expenses, costs of administration, widow's share, etc. The sixth class is:

"Sixth. All other debts and demands of whatever kind without regard to quality or dignity, which shall be exhibited to the court within one year from granting of letters as aforesaid.

"All claims and demands of whatever class not exhibited to the court within one year [13] from the granting of letters as aforesaid shall be forever barred as to property and estate of the deceased which has been inventoried or accounted for by the executor or administrator; and if the executor or administrator shall thereafter file any inventory listing other estate not previously inventoried or accounted for, and shall cause notice to be published in the manner provided by Section 60 of this Act, or give such other notice as the court may direct, of a day fixed upon, which shall be not less than three months after the date of such first publication, for the filing and exhibiting of further claims against said decedent, all claims not exhibited to the court prior to the date so fixed shall be forever barred as to the property and estate listed in such inventory, and the amount remaining due on all claims exhibited to the court on or prior to the day so fixed upon as aforesaid, including those filed within one year from the granting of letters, shall be paid *pro rata* out of such subsequently inventoried estate, saving, however, to infants, persons of unsound mind and persons in the employment of the United States or of this State and residing outside of the United States, the term of one year after their respective disabilities are removed to exhibit their claims."

[12] Chapter 3, ¶ 71 § 70 Ill. Rev. Stats., 1935.

[13] An earlier statute fixed the time at two years. Many of the Illinois cases cited arose under the prior law.

In Illinois a creditor whose claim against a decedent's estate is not due may present it for allowance and settlement provided the liability of the decedent was absolute.[14] Contingent claims may not be proved.[15] Section 70 is not a general statute of limitations but a specific provision intended to facilitate the early settlement of estates.[16] It results that a claim not presented within the year, though not entitled to be paid from assets inventoried within the year, is not barred, but may be collected out of assets subsequently discovered; and this is so whether the failure timely to present the claim was due to the creditor's negligence, or to the fact that the claim was contingent in character and did not become absolute by the happening of the contingency during the year.[17] If the claim is contingent, and the liability of the estate does not become absolute until after the expiration of the year, the creditor may recover from the distributees to the extent of the assets received by them respectively.[18]

The claimant has only to present and prosecute his demand in the probate court, which has jurisdiction both of legal demands and those cognizable in equity.[19] While, therefore, the creditor need not resort to a court of law or equity to establish his claim, he may do so, since the jurisdiction of those courts over such claims has not been abolished.[20] He may present his claim to the probate court and, at the same time, proceed in equity in the circuit court for specific per-

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[14] Cahill's Ill. Stat. 1923, Ch. 3 ¶ 68; *Johnson* v. *Tryon*, 78 Ill. App. 158; *Dunnigan* v. *Stevens*, 122 Ill. 396; *Foreman Trust & Sav. Bank* v. *Tauber*, 348 Ill. 280.

[15] *Stone* v. *Clarke's Administrators*, 40 Ill. 411; *Dugger* v. *Oglesby*, 99 Ill. 405; *Mackin* v. *Haven*, 187 Ill. 480; *Union Trust Co.* v. *Shoemaker*, 258 Ill. 564; *Chicago T. & Tr. Co.* v. *Fine Arts Bldg.*, 288 Ill. 142; *Robison* v. *Harrington*, 61 Ill. App. 543; *Brown* v. *Rouse*, 116 Ill. App. 513; *Bocock* v. *Leet*, 210 Ill. App. 402.

[16] *Waughop* v. *Bartlett*, 165 Ill. 124; *Durflinger* v. *Arnold*, 329 Ill. 93.

[17] *Peacock* v. *Haven*, 22 Ill. 23; *Russell* v. *Hubbard*, 59 Ill. 335; *Shephard* v. *Rhodes*, 60 Ill. 301; *Shepard* v. *National Bank*, 67 Ill. 292; *Snydacker* v. *Swan Land Co.*, 154 Ill. 220; *Union Trust Co.* v. *Shoemaker*, 258 Ill. 564; *Chicago T. & T. Co.* v. *Fine Arts Bldg.*, 288 Ill. 142; *People* v. *Small*, 319 Ill. 437.

[18] *Snydacker* v. *Swan Land Co.*, 154 Ill. 220; *Union Trust Co.* v. *Shoemaker*, 258 Ill. 564; *Beebe* v. *Kirkpatrick*, 321 Ill. 612; *Durflinger* v. *Arnold*, 329 Ill. 93; *Whittemore* v. *Weber*, 217 Ill. App. 628.

[19] *Hurd* v. *Slaten*, 43 Ill. 348; *Matter of Corrington*, 124 Ill. 363; *Matthews* v. *Kerfoot*, 167 Ill. 313; *Trego* v. *Cunningham*, 267 Ill. 367; *Pollock* v. *Cantlin*, 253 Ill. App. 229; *In re Estate of Kinsey*, 261 Ill. App. 481.

[20] *Rosenthal* v. *Magee*, 41 Ill. 370; *Wells* v. *Miller*, 45 Ill. 33; *Mason* v. *Tiffany*, 45 Ill. 392; *Darling* v. *McDonald*, 101 Ill. 370; *Roberts* v. *Flatt*, 142 Ill. 485; *Bradwell* v. *Wilson*, 158 Ill. 346.

formance of the contract out of which the claim arises;[21] or present a mortgage note to the probate court and bring suit in equity to foreclose the deed of trust securing it so as to share in estate assets for any deficiency in his security.[22] But whatever the forum in which he prosecutes his demand, no execution is issued upon the judgment or decree obtained. Whether the claim is presented to the probate court or litigated in some other, within the year, the judgment is that the claim be paid "in due course of administration",—that is, by an order of distribution out of the proceeds of inventoried assets.[23] If judgment is recovered upon a demand, presented to the probate court or prosecuted at law or in equity after the expiration of the year, the judgment is special, that the claim be paid out of assets inventoried or discovered after the lapse of the year, like the common law judgment *quando acciderint*;[24] or that it be enforced against distributees.[25] The only bar to the recovery of such a judgment is the general statute of limitations.[26]

A creditor cannot subject inventoried assets, undistributed and held by the administrator, to the payment of his claim by instituting, after the expiration of the year, and prosecuting to judgment, an action of debt against the administrator.[27] Nor can one who has failed to present his claim to the probate court, or to institute suit or action on it within the year, resort to a court of equity to have his demands paid out of undistributed inventoried assets.[28]

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[21] *Aldrich* v. *Aldrich*, 287 Ill. 213, 224; *Crawley* v. *Howe*, 223 Ill. App. 394, 398.

[22] *Kittredge* v. *Nicholes*, 162 Ill. 410, 412; *Dyer* v. *Hall*, 201 Ill. App. 183.

[23] See the cases in Note 19. *Welch* v. *Wallace*, 8 Ill. 490; *Peck* v. *Stevens*, 10 Ill. 127; *Bull* v. *Harris*, 31 Ill. 487; *Dye* v. *Noel*, 85 Ill. 290.

[24] *Bradford* v. *Jones*, 17 Ill. 93; *Peacock* v. *Haven*, 22 Ill. 23; *Rosenthal* v. *Magee*, 41 Ill. 370; *Mulvey* v. *Johnson*, 90 Ill. 457; *Darling* v. *McDonald*, 101 Ill. 370, 374.

[25] *Roberts* v. *Flatt*, 142 Ill. 485; *Union Trust Company* v. *Shoemaker*, 258 Ill. 564.

[26] *Guy* v. *Gericks*, 85 Ill. 428; *Wilding* v. *Rhein*, 12 Ill. App. 384.

[27] *Pearson* v. *McBean*, 231 Ill. 536.

[28] *Strauss* v. *Phillips*, 189 Ill. 9, 23; compare *Blanchard* v. *Williamson*, 70 Ill. 647. The petitioner cites cases to the effect that probate courts in Illinois act upon equitable principles. Some of these are collected in Note 13, *supra*, but they go only to the point that in probating claims against an estate those courts recognize equitable doctrines, and do not remit a creditor to a court of equity if his claim is equitable rather than legal. No statute or case has been found indicating that these tribunals have independent equity jurisdiction.

It is apparent that the decision under review enforces the policy of the state evidenced by section 70 of the Administration Act as it has been uniformly applied to claims of like character.

The petitioner relies on *Mortimer* v. *Potter,* 213 Ill. 178, but it is not in point. The claim of the receiver for an assessment in that case accrued after the estate had been fully administered and while the stock with respect to which assessment was levied was in the hands of a trustee to whom it was devised by the testator. Under the principles of Illinois law, as has been shown, such a devisee who received assets from the decedent's estate is liable for the assessment to the extent of those assets.

The petitioner also cites *Zimmerman* v. *Carpenter,* 84 Fed. 747, as authority in his favor. In that case a circuit court of the United States entered a decree charging the assets in the hands of an executor with the amount of an assessment levied after the decedent's death. It is not clear from the opinion whether the court thought that section 66 creates a lien on estate assets from the date of the bank's failure or construed the section as creating a claim *sui generis* enforceable directly against assets in the possession of the executrix and under the control of a state court of competent jurisdiction. As we have shown above, either theory is wrong.

In the absence of federal legislation giving priority to a claim for an assessment of stockholders' liability over other debts, or a lien upon the assets of a deceased stockholder's estate, or a special remedy, the claim is not entitled to distribution otherwise than as specified in a nondiscriminatory statute of the domicile. The judgment is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.